129-178

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1262.

WILLIAM P. MARROW AND MARY MARROW, HIS WIFE; GEORGE B. WEST AND MISSOURI SMITH, PLAINTIFFS IN ERROR,

vs.

JOSEPH B. BRINKLEY, JOHN L. PEEK, JOHN B. WHITEHEAD ET AL.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED OCTOBER 10, 1888.

patent here under the present practice gives a clue which will enable those interested to determine the facts as to the expiration of the patent. If no date as to particular foreign patents be given on the face of the patent, the public may be kept in ignorance of the foreign patent, and royalty may be collected on an expired patent.

I am, therefore, of opinion that the Commissioner of Patents should insert in patents issued by him the limitation shown by the faets in his possession touching the existence and date of foreign patents for the same invention so far as developed, and should also refer to the law limiting domestic patents to the life of foreign patents for the same invention.

Very respectfully,

S. J. KIRKWOOD,
Secretary.

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a *Pleas Before the Supreme Court of Appeals of Virginia on Thursday, May 17th, 1888.*

VIRGINIA:

Be it remembered that heretofore, to wit, on the 11th day of August, 1887, came William P. Marrow and Mary E., his wife; George B. West, and Missouri Smith and filed their petition praying for an appeal from a decree pronounced by the circuit court of Elizabeth City county on the 26th of October, 1886, in a suit in which the petitioners were plaintiffs and Joseph B. Brinkley and others were defendants; which petition, with the transcript of the record of said decree, filed therewith, is as follows:

1 *Petition.*

To the honorable judges of the supreme court of appeals of Virginia:

The petition of William P. Marrow and Mary E., his wife; George B. West, and Missouri Smith respectfully sheweth—

That your petitioners are aggrieved by a decree of the circuit court of Elizabeth City county, rendered on the 26th day of October, 1886, in a certain suit in equity wherein they were plaintiffs and Joseph B. Brinkley, John L. Peek, John B. Whitehead, A. P. Thom, trustee; William H. Kimberly, Martin McDevitt, Charles F. Groome and Emma D., his wife; George W. Schermerhorn, and George Booker were defendants. A transcript of the record of said suit is herewith filed.

The facts of this case, as shewn by the record, are as follows:

I. In the year 1831 Parker West obtained title to a tract of land, containing about 265 acres, situated in the county of Elizabeth City (now in Warwick county), called "Newport News."

2 On the 3d day of December, 1863, proceedings were instituted in the United States court for the eastern district of Virginia to confiscate this land, as the property of Parker West, under an act of Congress approved July 17th, 1862. A decree of confiscation was entered in said court on the 3d of June, 1864, the land was sold, for $3,150, to J. B. Alexander and John J. Bowen, the marshal of the district executed and delivered to them a deed for the land 15th of February, 1865, and they entered into possession of the land under the deed and remained in possession until the death of Parker West, in December, 1871.

II. At August rules, 1870, Joseph Brinkley, by his counsel, Charles K. Mallory, filed his bill against Parker West, Thomas Latimer, and Jno. A. Curtis to enforce the lien of a judgment obtained against them March 15th, 1861, for $400, describing the "Newport News" tract and other lands owned by Parker West and certain lands owned by Thomas Latimer, all of which he sought to subject to his lien.

At the same rules John L. Peek filed his bill against Parker West and Geo. B. West, trustee, to enforce the lien of a judgment obtained by him at the March term, 1867, of the circuit court of Eliza-

beth City county describing the said "Newport News" tract and other tracts of land owned by Parker West, and praying that they be subjected to the payment of his judgment. The interest of Parker West in the Newport News tract was alleged to be "the reversion after an estate for his life which was confiscated and sold by the authority of the United States during the late civil war."

At the September term of the circuit court of Elizabeth City county, in the year 1870, the said suits of Brinkley *vs.* Latimer and West and Peek *vs.* West were consolidated with another suit styled Willis *vs.* Latimer, the object of the latter suit being a partition of lands owned jointly by Latimer and Willis. In these consolidated causes a decree was entered for an account of the annual and fee-simple value of the lands described and the liens thereon. As to the Parker West lands, the commissioner was directed to report "the claim of title to any party for any portion thereof and the character and circumstances attending the same."

Under this decree the commissioner reported a large number of liens by judgment against Parker West, most of them security debts, and all of them, except the judgment of Brinkley, obtained after the decree of confiscation heretofore mentioned. He reported that Parker West owned (9) nine different tracts of land, in all of which he had a fee-simple title, except the "Newport News" tract and a lot in the town of Hampton.

He also reported that the "Newport News" tract was "in the possession of J. B. Alexander and J. J. Bowen under a title
3 derived from the marshal of the United States district court of Virginia, having been sold, under what is known as the confiscation act, in 1864."

On the 4th day of May, 1871, a decree was entered in these consolidated causes for the sale of the lands of Latimer, described in the bill, the lands of Parker West, described in the proceedings; and, as to the land now in controversy, the decree directed a sale of "all the interest of Parker West in that certain tract of land known as Newport News." The special commissioners authorized to make the sale were Charles K. Mallory, Thomas Tabb, and Geo. M. Peek, and they were directed to except from the sale of the Newport News tract 50 acres alleged to have been sold to A. J. Ford and 12 acres alleged to have been sold to Geo. B. West by Parker West.

At the November term, 1871, the special commissioners reported that they had sold at public auction lands of Parker West other than the Newport News tract, sales of which amounted to $860, and lands of Thomas Latimer, the sales of which amounted to $437.14.

They reported that the alleged sales by Parker West to A. J. Ford and Geo. B. West had been made by him. All of these sales thus reported were confirmed at this term of the court, and the special commissioners were directed to execute the decree of May 4, 1871, by selling the residue of the "Newport News" tract at private sale.

No allegations were made in the said bills affecting or claiming to affect in any way the rights of J. B. Alexander and J. J. Bowen,

the purchasers of the Newport News tract at the confiscation sale, or the rights of Geo. B. West, Mary E. Marrow, Missouri Smith, and Elizabeth R. West, the children of Parker West and his heirs presumptive; no relief was asked against them and no process was issued against or served on them. Geo. B. West, as trustee under a deed made by Parker West after the confiscation sale, was made a party.

III. At the May term, 1872, the special commissioners reported that they had sold the Newport News tract to various parties in parcels, as indicated in plat Exhibit "B" (p. 66 of Record). Among the purchasers were C. F. Groome and Emma, his wife, of (5) five acres, part of lot No. 2; W. H. Kimberly (3) three acres, part of lot No. 4; Martin McDevitt ($\frac{1}{2}$) one-half acre, part of lot No. 6; and at a subsequent term they reported the sale of ($20\frac{1}{2}$) twenty and a half acres, lot No. 8, to Jno. B. Whitehead and Jno. S. Tucker. These sales were confirmed by the court. When the purchase-money was paid
Geo. M. Peek, one of the special commissioners, was directed
4 to convey the land to the purchasers, and he executed deeds to them in the years 1879 and 1880.

Neither in the report of sales made to May term, 1872, the decree confirming said report, the decree at April term, 1879, directing deeds to be made to the purchasers, or the report of Commissioner Geo. M. Peek that he had executed the deeds contain any expression of any kind indicating that a fee-simple title in the land was intended to be conveyed. Neither the deeds themselves nor the proposed form of the deeds were reported to the court. The report to May term, 1872, states that the sales were made under the authority of the decree of May 4, 1871, which in terms directed a sale only of "the interest of Parker West in the land." (See report 1872, p. 194 to 204; decree May, 1872, p. 192; decree 1879, p. 302–'3; report, April, 1880, of execution of deeds, p. 302–'3; report, October, 1872, p. 207, and decree, p. 209 of Record.)

In December, 1871, Parker West died intestate, leaving Geo. B. West, Mary E. Marrow, Missouri Smith, and Elizabeth R. West his heirs-at-law.

After the death of Parker West, in the consolidated causes heretofore named no steps were taken to make the heirs of Parker West parties to said suits by bill of revivor or by issuing a *scire facias*, provided by statute in such cases. No summons, process, or notice of any kind was given them that any decree or order would be entered in any way affecting them, nor did they have notice of any kind that any decree was so entered until informed by their counsel, Burroughs & Bro., in 1883.

At the October term, 1875, of the Supreme Court of the United States the case of Wallach *vs.* Van Ryswick was decided (92 U. S., 202), construing the confiscation act, under which the lands in controversy in this suit were sold, declaring that the effect of the act was to vest in the purchaser at the confiscation sale the title of the offender for his life, and that at his death his heirs became entitled to the same absolutely.

They learned of this decision some time in the year 1876, and

thereafter asserted their claim to the Newport News tract, which had been sold in the said consolidated causes, and on the 6th day of December, 1880, they sold their interest in all of said tract, except 44 acres, to C. P. Huntington (Exhibit "C," p. 67 of Record).

Prior to this sale C. P. Huntington had made contracts with the persons who bought this part of the Newport News tract in the consolidated suits heretofore named. The heirs of Parker West, desiring to protect these purchasers as far as possible while asserting their own rights to this land, stipulated as one of the conditions of their sale to Huntington that he should in any event pay to these purchasers at least $150 per acre for these lands, a sum sufficient to repay them the amount of purchase-money and interest paid by them to the special commissioners in said consolidated suits. (See Exhibit "A," with deposition of Geo. B. West, p. 453 of Record.)

IV. In the year 1881 they directed suit to be instituted to recover the residue of the Newport News tract, the land now in controversy. A summons was issued against the parties, but, owing to some misunderstanding with counsel, no bill was filed. (See Exhibit "B," with deposition of Geo. B. West, p. 454 of Record.)

In 1883 the heirs employed their present counsel, who examined the record in the consolidated causes and informed them of the decree of May 4th, 1872, which recites that "the death of Parker West being suggested, on the motion of William P. Morrow and Mary E., his wife, Elizabeth R. West, George B. West, M. Smith, and Missouri, his wife, the said Mary E. Marrow, Elizabeth R. West, Geo. B. West, and Missouri Smith being the heirs-at-law of Parker West, to be made parties defendant to these causes, the said William P. Marrow and Mary E., his wife, Elizabeth R. West, George B. West, and M. Smith and Missouri, his wife, are hereby made parties defendant to these causes, with leave to file their answers."

This was the first notice that the heirs of Parker West had that any decree or order of any kind had been made in these causes claiming to affect their rights in any manner to the Newport News tract. They had not employed any attorney to act for them in these causes at any time, nor had they authorized any one to appear for them and make such a motion. They did not make such motion by appearing in person in the court in which the suits were pending, and no one of them was even in the town of Hampton, in which the court was held, on the day the decree was entered.

In 1885 the petitioners and Elizabeth R. West (who has since died) instituted their action of ejectment against the defendants for the land in controversy. The defendants claimed title under the deeds executed to them by Special Commissioner Geo. M. Peek in the consolidated causes. The court, upon a motion to exclude the deeds, held that, whatever might be the defect in these consolidated causes and in the decree of sale of May 4th, 1871, it was cured by the decree of May 4th, 1872, confirming these sales and making the heirs parties, and that the heirs of Parker West could not in this collateral suit attack the decree of May 4th, 1872, by showing that

its recitals were false, and thereupon the plaintiffs in that suit took a nonsuit.

Prior to the institution of this action of ejectment the plaintiffs, through their counsel, tendered to the defendants the amount
6 of purchase-money which they had paid to the special commissioners in the said consolidated causes, with interest thereon.

V. Immediately upon the entering of the nonsuit in the action of ejectment the plaintiffs filed their bill against Joseph B. Brinkley and John L. Peek, the plaintiffs in the consolidated causes heretofore named and the defendants in the ejectment suit, who are in possession of the land in controversy under deeds made by the special commissioner, Geo. M. Peek, in pursuance of decrees in the consolidated causes, in which they allege the facts recited in this petition, and that at the time the decree of sale—May 4th, 1871—was entered Parker West, the only person before the court and as to whom there were any allegations affecting the title to the Newport News tract, had no interest whatever in said land; that the said decree was void as to them; that the decree of May 4th, 1872, reciting their motion to be made parties, was false; was procured by the fraud of the plaintiffs in the consolidated causes or some one acting for them, and was void, and that the defendants in possession of the land were claiming the benefit of these void and fraudulent decrees, alleging that these void decrees and the deeds obtained under them were clouds upon their title to the land and obstructed their proceedings at law to obtain possession of the land, and asking that the decrees of May 4th, 1871, and May 4th, 1872, and the deeds named might be vacated, cancelled, and annulled.

There is on deposit to the credit of the consolidated causes in the Marine Bank and Citizens' Bank of Norfolk the sum of $8,370.41. (See Record, pp. 79, 80.) This sum is the proceeds of the sale of Newport News tract, after paying debts of Parker West. In the said suits there were decrees directing it to be paid to the heirs of Parker West, but they have always refused to take it, claiming that they had the legal title to the land.

In the answers of some of the defendants to this bill it was claimed that Charles K. Mallory, an attorney-at-law, appeared for the heirs of Parker West, and made the motion mentioned in the decree of May 4th, 1872, to make them parties. This was the first time the plaintiffs knew who was claimed to have acted for them. In the depositions of the plaintiffs they deny that they authorized him to appear for them or to represent their interests in the consolidated causes. They knew and the record shews that he was counsel for the plaintiffs in one of the consolidated causes and represented a large number of claims against Parker West. He represented an interest which was antagonistic to them, and could not undertake to protect their interets if they had desired to employ him.

The lands in controversy were unimproved lands at the
7 time they were sold, and no improvements have been put upon them since the sale.

On the 26th of October, 1886, the court dismissed the bill of the plaintiffs.

The petitioners are aggrieved by the said decree and assign the following errors:

(1.) A court of equity has jurisdiction to relieve against void and fraudulent judgments and decrees.

"A decree obtained without making those persons parties to the suit in which it is had whose rights are affected thereby is fraudulent and void as to those parties." Story's Equity Pleading, p. 427.

Evans *vs.* Spurgin, 11 Gratt., 615—Samuels, J.: "If we could even hold that the party was guilty of no actual fraud in removing the case from the court at Staunton to Monongalia and proceeding there without reviving against Lantz's heirs and administrator, yet the gross disregard of the rights of others manifested in that proceeding is equivalent to fraud—it does all the mischief of fraud"—p. 623. Walters *vs.* Hill, 27 Gratt., 388; Freeman on Judgments, § 495; Ryan *vs.* Boyd, 33 Ark., 778; Newcomb *vs.* Dewey, 27 Iowa, 381; Ridgeway *vs.* The Bank of Tennessee, 11 Humphreys, 523; Bridgeport Sav. Bank *vs.* Eldridge, 28 Conn., 556.

(2.) The defendants claim a fee-simple title under their deeds from Special Commissioner Geo. M. Peck, by virtue of the decree of sale May 4th, 1871.

J. J. Bowen and J. B. Alexander, owners of the land under the confiscation sale for the life of Parker West, and the children of Parker West, his heirs presumptive, were necessary parties to the suit in which a sale of the fee-simple title is decreed.

The only parties defendant to the suit were Parker West and Geo. B. West, trustee. Parker West had no interest of any kind in the land; Geo. B. West, trustee, under a deed made after the confiscation, had no title of any kind, because his grantor had none.

What was the character of the suits, the consolidated causes, in which decree May 4th, 1871, was entered?

They were suits, under § 9, ch. 182, of Code 1873, to enforce judgment liens against a judgment debtor's land, brought during the life of the debtor. They were not suits to administer the real and personal assets of a decedent.

(*a.*) Nature of the judgment lien.

It is a general lien—a right to satisfaction out of the
8 debtor's property, such estate as the debtor is really entitled to. 2 Barton's Ch'y Pr., 880; Brown *vs.* Pearce, 7 Wall., 205; Borst *vs.* Nalle, 28 Gratt., 422; Adams' Equity (149), 350.

Coombs *vs.* Jordan, 3 Bland's Ch'y, 284, S. C., 22 Am. Dec., 236: "The lien upon real estate, which is incident to a judgment against its owner, extends no further than to cover the whole of that right which he himself might have voluntarily transferred to his creditor in satisfaction of his debt. Its operation is always limited by the extent of the debtor's power of alienation. The alienation of lands is either voluntary, as by deed *inter vivos* or last will and testament, or it is involuntary, as by attachment of law," p. 248. In a suit to enforce a judgment lien on land it is not necessary even to allege insufficiency of personal estate. Price *vs.* Thrasher, 30 Gratt., 526–'7.

All of the judgments except that of Brinkley were obtained after the confiscation sale, and as to these the only interest that could be sold was such as Parker West had after such sale.

(*b.*) What estate had Parker West after confiscation?

After seizure, condemnation, and sale there was "left in him no estate or interest of any description which he could convey by deed and no power which he could exercise in favor of another." Strong, J., in Wallach *vs.* Van Riswick, 92 U. S., p. 208. Affirmed in Pike *vs.* Wassell, 94 U. S., 711; French *vs.* Wade, 102 U. S., 133; Waples *vs.* Hays, 108 U. S., 6; Avegno *vs.* Schmidt, 113 U. S., 293.

As Parker West had no estate to which the judgments could attach he had nothing to be sold. The decree of May 4th, 1871, was simply a nullity. The court had no jurisdiction of the parties owning the land or of the subject-matter of the suit—the land.

Lamar's Ex'or *vs.* Hale, 79 Va., 147—Richardson, J.: "But here the only ground of jurisdiction apparent on the record is one which could not lawfully give the county court of Carroll county the jurisdiction exercised by it, viz., the enforcement of a judgment lien on the real estate of one party against the real estate of another party," p. 163.

So in the case at bar the only ground of jurisdiction was the enforcement of a judgment against Parker West on the lands owned by other parties, to wit, J. J. Bowen and J. B. Alexander the life estate and the heirs of Parker West the remainder.

(*c.*) How stands the case as to the Brinkley judgment obtained in 1861, before confiscation?

That was a lien on the land, but all the interest of the judgment debtor, Parker West (subjected to the lien), passed from him by confiscation.

9 Who were necessary parties to a suit to enforce Brinkley's lien?

The general rule as to parties is: "All persons interested in the subject-matter of the bills, and which is involved in and to be affected by the proceeding and result of the suit, should be made parties." 1 Barton Ch'y Pr., p. 133–'4.

The rule as to mortgages is: "If a mortgagor assigns his equity of redemption absolutely to several persons they must all be made parties." Story's Eq. Pl., § 197.

"Where there are estates in remainder or reversion after a life estate in the equity of redemption it is generally sufficient to bring before the court the first person in being who has a vested estate of inheritance, together with those claiming the life estate." 2 Jones on Mortgages, § 1401; 1 Barton Ch'y Pr., p. 186.

What was the effect of the confiscation as to Brinkley's judgment? It was to divest all interest of Parker West of any description that was forfeited. The forfeiture was equivalent to a conveyance by Parker West to the United States to their use during his life and to that of his heirs after his death. Brief of Albert Pike, 92 U S., p. 204–'5, and opinion of court by Strong, J., p. 210–'11.

After the deed of the marshal to Bowen and Alexander they held

the estate for the life of Parker West, with remainder to the heirs of Parker West.

The children of Parker West alive at the date of the suits were the heirs presumptive, the persons *in esse* representing the remainder in the land.

In Pike *vs.* Wassell, 94 U. S., 711, Waite, C. J., speaking of the children of the offender, says: "If they do not hold the fee they are certainly the only persons now living who represent those for whose benefit the joint resolution of Congress was passed. They at least appear to have the estate in expectancy. Under these circumstances, as there is no one else to look after the interests of the succession, we think they may properly be permitted to do whatever is necessary to protect it from forfeiture or incumbrance," p. 714–'5. Affirmed in Avegno *vs.* Schmidt, 113 U. S., 293.

In this case last cited it was claimed that the children of the offender were necessary parties to a suit to foreclose a mortgage made before confiscation. Woods, J., said: "These decisions, alone considered, apparently sustain the contention of the plaintiffs that a decree in a suit to foreclose the mortgage to which Avegno was the sole defender was without the necessary parties, and was therefore void for want of jurisdiction in the court to render it," p. 299.

It is therefore claimed that Bowen and Alexander, owners
10 of the life estate, and the children of Parker West living, entitled in expectancy to the remainder, were necessary parties to the suit to enforce Brinkley's lien, obtained prior to confiscation; the children were the owners of the equity of redemption in the land entitled to redeem—entitled to protect it from incumbrance or from sale.

(3). No process was served on the heirs presumptive of Parker West, no allegation was made as to them in the bills, no relief was asked against them; the court did not have jurisdiction over them, and the decree of May 4th, 1871, was void.

What gives jurisdiction over the parties? "Jurisdiction over the parties is acquired when the person is actually and personally served with process within the territorial limits of jurisdiction, or when he appears and by his pleading admits the jurisdiction." 7 Robinson Pr., p. 16; 2 Herman on Estoppel, § 816; 7 Rob. Pr., p. 52; Cooley on Const. Limitations, pp. (402–'3), n. 2.

In Jack *vs.* Thompson, 41 Miss., 49, the court says: "Notice of some kind is the vital breath that animates judicial jurisdiction over the person. It is the primary element of the application of the judicatory power. It is of the essence of a cause; without it there cannot be parties, and without parties there may be the form of a sentence, but no judgment obligating the person."

(*a*) What is the effect of a judgment or decree against a person not served with process, who has not appeared and pleaded, and against whom there are no allegations in the bill and no relief asked?

It is void, it is a nullity, it is nothing. In the words of Mr. Freeman: "A void judgment is in legal effect no judgment. By it no rights are divested; from it no rights can be obtained. Being worth-

less in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress." Freeman on Judgments, § 117.

Campbell *vs.* McCahan, 41 Ill., 45; Andrews *vs.* State, 2 Sneed, 550; Roberts *vs.* Stowers. 7 Bush., 295; Hollingsworth *vs.* Bagley, 35 Texas, 345; Hargis *vs.* Morse, 7 Kans., 417; Morton *vs.* Root, 2 Dillon C. C., 312; Walters *vs.* Hill, 27 Gratt., 397–'8; Thurman *vs.* Morgan, 79 Va., 367; Ogden *vs.* Davidson, decided decree 1885, X Vol. Va. Law Journal, p. 59; Moseley *vs.* Cocke, 7 Leigh, 224.

In the case last cited process was served on the party, but
11 there were no allegations against him in the bill and no relief asked against him.

(4.) It is claimed, however, that the sales made under this void decree May 4th, 1871, were confirmed by the court in May, 1872, when the heirs of Parker West were before the court, and thus the error in the void decree is cured.

Concede that a *scire facias* had been issued and served upon the heirs of Parker West, returnable to May, 1872, can the defect in the void decree be cured by the decree of confirmation?

What answer could they make to a bill which alleged nothing as to them? What objection could they urge to the confirmation of a sale made under a decree which directed a sale of "all the interest of Parker West in that certain tract of land known as Newport News," and did not refer in any way whatever to their interest in the land?

We claim that no decree could make valid as to the heirs the decree of May 4, 1871, which was void.

(*a.*) "But the curative powers of orders of confirmation extend to voidable rather than to void sales. If a sale be void because the court did not have jurisdiction to order it an order confirming it is necessarily inoperative. The sale being void there was no subject-matter upon which the order of confirmation could act." Freeman on Void Judicial Sales, § 44, n. 2.

Shriver *vs.* Lynn, 2 Howard (U. S.), 43, 60–'1; Minn. Co. *vs.* St. Paul, 2 Wall., 609, 641; Pike *vs.* Wassel, 94 U. S., 711, 713; Townsend *vs.* Tallant, 33 Cal., 54; Bethel *vs.* Bethel, 6 Bush., 65; Gray *vs.* Brignardello, 1 Wall., 627, 634; *in re* College Street, 11 Rhode Island, 472. See Seamster *vs.* Blackstock, Va. Law Journal, Sept'r, 1887, p. 568.

(*b.*) Such defects are not only incapable of being cured by a decree of a court in which the proceedings are had, but the Legislature has not the power to cure them. The distinction, both as to the power of the court and that of the Legislature, is between decrees voidable for error or irregularity and decrees void for want of jurisdiction. The former may be cured, the latter are incurable.

Cooley on Const. Limitations (3d ed.), p. (107).

Richards *vs.* Rote, 98 Penn St., 248, on pp. 252–'3 of the opinion, the distinction between void and voidable is clearly drawn.

In Griffin *vs.* Cunningham, 20 Gratt., 31, the cases cited by Mr. Cooley are approved. Opinion of Joynes, J., pp. 106–'7, 108–'9, and 111. On latter page he says: "I submit, therefore, that it is clear that if the decrees before us were void when rendered for want
12 of authority in those who rendered them to render any decree whatever, they are void now as they were at first, because it was not in the power of the Legislature to make them valid by confirmation."

The proceedings prior to May 4, 1872, as to the heirs of Parker West were a nullity; the suit was a dead thing, and the court did not possess the power to infuse life in it by its decree and make it alive.

If the *scire facias* had been duly issued and served, and the heirs of Parker West had appeared in May, 1872, they would have been before the court to answer a bill which contained no allegations as to their interest in the land in controversy or as to the liability of their interest in the land for the debts of the creditors. As in the case of Moseley *vs.* Cocke, 7 Leigh, 224, the bill as to them was a nullity, and the proceedings founded on it could not affect them. S. P. Ogden *vs.* Davidson, Va. Law Journal, Vol. X, p. 59: "Decree against one not named in bill nor embraced in its prayers is a nullity, although a writ or rule to show cause is served upon him."

(5.) It is claimed, however, that the heirs took by descent from Parker West, and, so taking, the land was liable in their hands for the debts of their ancestor. The forfeiture by confiscation was an alienation of the land, and the debts of the offender upon which judgment was obtained after such alienation could not affect the land previously alienated. 92 U. S., pp. 204–'5, 210–'11.

But if the proposition be conceded it does not apply to this case.

It would apply in a suit by creditors to administer the real and personal assets of a decedent. In such a suit the personal representative is an essential party, the personal estate being the primary fund for the payment of debts. 1 Barton Ch'y Pr., pp. 185–'6, n. 1., p. 155, n. 2, 3, 4. The personal representative of Parker West was not mentioned in any of the proceedings in the consolidated causes.

These consolidated suits were to enforce liens existing and binding the land at the beginning of the suits. They seek no account of the personal estate of Parker West; it was necessary so to do in such suits. Price *vs.* Thrasher, 30 Gratt., 515.

The character of these suits *were* not changed by the death of Parker West (the ancestor). In these suits the bills claimed nothing as against the heirs; only a lien upon the interest of the ancestor is asserted. The revival of these suits in due form against the heirs could not create a new suit, asserting a liability for the debts of the ancestor to the extent of lands descended.

Such a question could only arise in a suit for the administration of the assets, real and personal, of the ancestor, in which
13 it was alleged the personal estate was not sufficient to dis-

charge the debts, and therefore that the real assets descended were liable in the hands of the heir.

A creditor's suit to administer assets is the only suit in which such a question could arise. It could not arise in a suit commenced against a living person to enforce a lien on his real estate.

(*a.*) If these propositions be correct, then the decree of May 4th, 1872 (conceding the heirs to be parties), did not adjudicate the question of the liability of the lands in the hands of the heir for the ancestor's debt.

If the bills had been amended, the personal representative made a party, allegations made of a deficiency of personal assets, of the liability of the lands descended in the hands of the heir, the suits would have been substantially changed into creditors' suits.

But no amendments of any kind were made or suggested, and the only question raised in the bills was the liability of the interest of Parker West in the land to the liens of the creditors by judgment. The liability of the lands descended in the hands of the heirs or coming to them by confiscation was not asserted or even hinted at.

And the decree of sale, May 4th, 1871, was a logical sequence from the allegations of the bills—a decree to sell the interest of Parker West, not to sell the fee, for the bills alleged that he did not have the fee. "The reversion after an estate for his life, which was confiscated and sold during the late civil war, in a tract of land known as Newport News," is the language of one of the bills (p. 140 of Record).

We therefore claim that no such question was or could be raised in the consolidated causes, and the decrees in that suit do not estop the heirs in this suit. The same question is not raised. Chrisman *vs.* Harman, 29 Gratt., 494–499.

(*b.*) We have endeavored to shew from the pleadings in the consolidated causes that the sale was only of such interest as Parker West might have. It was supposed prior to the case of Wallach *vs.* Van Riswick, 92 U. S., 202, that the offender had some interest which he could alienate and which his creditors could subject to their liens. This interest was sold and the purchaser took this interest only.

In the light of this decision the court did not have jurisdiction to sell the fee.

Had the language of the decree been such as to import a fee it would have been construed to be a decree for sale only of such
14 interest as the judgment debtor had. Bigelow *vs.* Forrest, 9 Wall., 339.

The language of the decree and the deed made under it in the case cited imported a fee, but as the law only authorized the sale of a life estate it was so construed. See opinion of Strong, J., p. 351.

And the opinion of Miller, J., in *ex parte* Lange, 18 Wall., 163, on pp. 176,–'7–'8, affirming the case in 9 Wall., 339, and using this language: "In other words, in a case where it (the court) had full jurisdiction to render one kind of judgment operative upon the same property it rendered one which included that which it had a right to render and something more, and this excess was held simply void."

In the consolidated causes the court had jurisdiction only to sell the interest of the judgment debtor. If it undertook to do more the excess was void.

(6.) What has been said so far is upon the concession that the heirs were properly before the court May 4, 1872.

It is claimed that neither by the recitals of the decree of that date nor in any other mode known to the law were they ever made parties to the consolidated causes.

The defendants do not allege that a *scire facias* or other legal process was served upon them; that there is any entry on the rule docket of the clerk indicating the issue of such process, or that process to answer a bill of revivor was served upon them, or that they appeared in person or by attorney and filed a plea, demurrer, or answer, or that there is any paper, receipt, or voucher of any kind to show that the plaintiffs submitted themselves to the jurisdiction of the court.

(*a.*) If the recital that the heirs made a motion to become parties be true, could they be made parties in that mode?

Prior to our statute on the subject of revival on the death of one of the parties to a suit in equity the mode of continuing the suit was to file a bill of revivor for or against the legal successors of the decedent.

The code of 1819 provided for a revival by a *scire facias* against the successors of the decedent, returnable to the next term of the court after the death was suggested, or, upon the death of either a plaintiff or defendant, on motion of the successors they could be made parties. 1 Rev. Code 1819, p. 497–'8, § 38.

In the Code of 1849 a change was made. When a plaintiff dies his successor is allowed to become a party by motion, but when a defendant dies his successor can only be made a party by means of a *scire facias*. Code 1873, ch. 169, § 4; 1 Barton's Ch'y Pr., p. 294–'5, § 100; Sands' Suit in Equity (new edition), p. 131; form of *scire facias*, p. 520; form of decree, IV Minor's Inst., p't I, p. 796.

By this change in the statute the privilege, which under Code of 1819 was extended to the successors of a defendant who dies to become parties by motion, was taken away, and it is necessary under the present statute to issue the *scire facias*. In Lavell & Jordan *vs.* McCurdy's Ex'or, 77 Va., 763, it was decided that the *scire facias* must be returnable in ninety days; if returnable after a longer period it is void; so that now when a defendant dies the suit abates until his successors by process (the *scire facias*) is brought before the court.

It may be said that a party can waive the service of process and submit to the jurisdiction of the court. It is true that may be done by appearance and pleading to the merits of the cause, but not by appearance only. 1 Barton Ch'y Pr., p. 148, p. 246; 7 Rob. Pr., p. 16; 4 Minor's Inst., p't I, p. 868–'9 (ed. 1878); 2 Herman on Estoppel, § 816; Tuberville *vs.* Long, 3 H. and M., 309.

And by analogy to waiver of original process it may be conceded that in case of the death of a defendant his successors by appearing

and pleading to the merits may submit themselves to the jurisdiction of the court. In the case at bar, while the decree of May 4th, 1872, recites appearance and leave to file answers, no answers were ever filed; nothing was done by the heirs to submit themselves to the jurisdiction of the court.

(*b.*) The recital in decree of May 4th, 1872, that the heirs of Parker West made a motion to become parties to the suit is a false recital.

In a direct attack upon a decree the rule is that when it appears that no process was served on the parties making the attack the burden of proof is upon those claiming under the decree to shew that they were parties. Opinion of Anderson, J., in Walters *vs.* Hill, 27 Gratt., p. 398.

The testimony of the clerk of the court is not only that there is no process returned served upon the heirs after the death of their father, but there is no entry on the rule book to shew that any process, *scire facias* or otherwise, was issued against them. It also shews that there was no process returned executed on Parker West or any entry on the rule book that such process had been returned executed. (Bickford's dep., pp. 389–'90–'91 of Record.)

The bill alleges that no process was served; that the heirs did not appear in person to make the motion; that they did not authorize any attorney to appear for them, and that they had no knowledge of the recitals of the decree of May 4, 1872, until the year 1883.

16 In the answers of the defendants they state that they have no personal knowledge on the subject, but they state that they have been informed that Charles K. Mallory appeared for the heirs. They do not state that they have been informed that Mallory had authority to appear for the heirs, or even that they believed that he had authority so to appear. (Answer of J. B. Whitehead, pp. 96–'7; of A. P. Thom, trustee, p. 119 of Record. The other answers are similar.)

Upon this state of the pleadings the negative allegations in the bill just stated, not being traversed in the answers, are to be taken as true. 1 Barton Ch'y Pr., pp. 398–'99, n. 2.

While there is no allegation in the answers that Charles K. Mallory had authority to appear for the heirs there is an attempt to prove it in the testimony. (Dep. of W. S. Howard, pp. 510, 522; of Geo. M. Peek, pp. 522–'30 of Record.)

(*c.*) The only testimony tending to shew authority in Mallory to appear for the heirs consists wholly of his declarations. Upon well-recognized principles an agent cannot by his own declarations create an agency. Poore *vs.* Magruder, 24 Gratt., 197, 200–'1.

It appears from the record in the consolidated causes that Mallory, as attorney for Brinkley, filed one of the bills and represented a large number of the judgment creditors of Parker West. He was the attorney of record for interests antagonistic to Parker West and to his heirs. It is against the policy of the law to allow attorneys to occupy such positions.

"No man, though by consent of parties, can be attorney on both

sides, for consent of parties cannot change the law." 1 Bacon's Abridg. — title, Attorney, p. 488; 2 Tucker's Comm., p. 46; 1 Wait on Actions, p. 243, and cases cited; 4 Minor's Inst., part I, pp. 177–'78; Bowers *vs.* Bowers, 29 Gratt., 702.

Not only was Mallory so situated that he could not represent the heirs, but the testimony of the heirs is plain and specific that they did not employ him; that he never informed them that he had assumed to act for them, nor did they employ any counsel to represent their interests in the matter until the year 1880. (Dep. Geo. B. West, pp. 425–'30; Missouri Smith, pp. 414–'18, and Mrs. Marrow, pp. 401–'6 of Record.)

Suppose that the heirs had retained Mallory to represent their interests in the matter in controversy and he had been so situated that he could accept their retainer; it is claimed that this retainer merely authorized him to conduct their cause in court; it gave him no power to waive the issuing and serving of personal process or to accept the service of original process.

An attorney must have special authority to accept service of process or to waive service of process. 1 Wait on Actions, p. 439; Starr *vs.* Hall's Ex'or, 87 N. C., 381; Masterson *vs.* Le Claire, 4 Minn., 163; Bayley *vs.* Buckland, 1 Exchequer, p. 1, 6 (Welsby, Hurlstone & Gordon); Anderson *vs.* Hawke, Ill. (3 N. W. Rep'ter, 566); 4 Minor's Inst., part I, p. 163 (108).

There is no attempt whatever in the case at bar to shew that Mallory had any special authority to waive service of process. If his declarations could be received as evidence at all they would not point to any more than a general retainer.

Does the unauthorized appearance of Mallory for the heirs bind them?

Clearly not. This would be depriving them of their property without "due process of law." Freeman on Judgments, § 499. Harshey *vs.* Blackmarr, 20 Iowa, 161; Shelton *vs.* Tiffin, 6 How., 644–'5.

The character of Mallory does not affect the question; it is a question of authority. Did he have the power to bind these parties? In Herbert *vs.* Alexander, 2 Call, 498, where Edmund Randolph, a duly retained attorney, exceeded his authority, it was held that the client was not bound. See opinion of Flemming, J., and Lyons, J., p. 503.

In Shelton *vs.* Tiffin, 6 How., 163, speaking of an entry in a similar case, McLean, J., remarks: "The appearance was the act of the counsel and not of the court. Had the entry been that L. P. Perry came personally into the court and waived process, it could not have been controverted; but the appearance by counsel, who had no authority to waive process or to defend the suit for L. P. Perry, may be explained. An appearance by counsel under such circumstances to the prejudice of a party subjects the counsel to damages, but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity," p. 186.

(7.) The defendants are not purchasers for value without notice.

(*a.*) This defence concedes that the decrees of May 4th, 1871, and May 4th, 1872, are void, but claims the protection of the court upon the ground that they have paid the purchase-money in good faith and without notice of the facts affecting the validity of the decrees.

Every judicial sale is, *per se*, a notice of everything appearing in the record containing the decree of sale. The doctrine is *caveat emptor*; it says to the purchaser, beware. It puts him upon enquiry.

In Woods *vs.* Krebbs, 30 Gratt., 708, 714–715, the court, per Christian, J., announces the doctrine in this language: "He must look to the title papers under which he buys, and is charged with notice of all facts appearing on their face or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or ears to the inlet of information and then say he is a *bona fide* purchaser without notice." Wissler *vs.* Craig's Adm'r, 80 Va., p. 32.

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These defendant's, except Whitehead, bought at private sale, between November, 1871, and May, 1872, and when they came before the court in May, 1872, to ask that the sales to them be confirmed, what did the record in the consolidated causes disclose?

It shewed then as it does now that the "Newport News" land had been confiscated; that the only party before the court, Parker West, had no interest of any kind in the land; that the bills only asked a sale of his interest, and that the court only ordered that to be sold; that the persons entitled to the fee, to wit, Bowen and Alexander, the purchasers of the life estate, and the children of Parker West, entitled to the reversion, were not before the court, and that the bills contained no allegations as to these persons representing the fee.

Was it not the plain duty of these purchasers to refuse to complete their purchase until by proper amendments of the bills it was charged that the fee in this land was liable to the judgment creditors of Parker West, and to bring before the court upon the amended bills the children of Parker West by "due process of law?"

The only reason that can be assigned why this step was not taken is that they believed at that time, as did many others prior to the decision of Wallach *vs.* Van Riswick, 92 U. S., 202, that the reversion at death of Parker West was in him, as charged in one of the bills, and thus their title would be good.

They made a mistake as to the law of the case just as the purchaser did in the case of Webb *vs.* The City of Alexandria, 33 Gratt., 168.

In that case the purchaser paid his money in good faith. He bought at a judicial sale; he supposed that the court obtained jurisdiction to sell by service of process on the auditor of the city instead of the mayor. In Fairfax *vs.* Alexandria, 95 U. S., 774, it was decided that this service did not give jurisdiction, and the sale was a nullity.

In 33 Gratt., p. 175, the court says: "It was his duty (the purchaser) to have inquired into the validity of the decree of confiscation. If he neglected his duty, and in consequence parted with his

money for naught, he cannot justly impute his own negligence to the appellant."

So, in the case at bar, the purchasers were satisfied with
19 purchasing the interest of Parker West; they knew that they had purchased nothing else.

As to J. B. Whitehead, who bought after May, 1872, he not only had the notice attaching to the others, but that decree recited the fact that at that time the sales of the lands were in "excess of the debts due by Parker West, deceased." He is charged with notice that the sale was not necessary for the payment of debts, and the court had no power to sell for any other purpose.

(*b.*) It is claimed, however, that the decree of May 4th, 1872, which confirmed the sales, recited the fact that the heirs were made parties on their own motion; that the purchasers had no actual notice; that the attorney who made the motion had no authority to act for them; that this want of authority is an extrinsic fact as to which the record is silent; and they as purchasers had a right to rely on the recitals of the decree.

This position assumes, first, that this is the only defect in the title obtained by them, which we have endeavored to show is not true; second, that if they had exercised proper diligence in pursuing their inquiries as to the title they would not have ascertained the want of authority. It is a pregnant circumstance in this connection that when C. P. Huntington bought from some of the purchasers in 1880 and had the title examined he ascertained even this extrinsic fact and procured a deed from the heirs.

1. We claim that the doctrine of a purchaser for value does not apply to such a case as this. It applies in a contest between equitable and legal estates or between equitable estates. In the former the court refuses to disarm the possessor of the legal title and in the latter case the equity prior in point of time prevails. 2 Pomeroy's Equity, § 681.

Illustration: A purchases land with the money of B, but he takes the deed in his own name; there is a resulting trust in favor of B, and, although A has the legal title, a court of equity will compel him to convey to B.

But suppose that A, having the legal title, sells to C, who has no notice of B's equity; then when B asks the court for relief against C the court will refuse to disarm C of his legal title for the purpose of enforcing B's equity; each has a claim upon the court for protection and it refuses to act.

But when the contest is between legal titles, that which is prior in point of time prevails. The fact that the holder of the legal title second in point of time paid value for it without notice of the prior title does not affect the question; he bought nothing, because the
20 title was in the first taker; it passed from the owner, and there was nothing to be sold. 2 Pomeroy's Equity, § 679, n. 2, on p. 129, and n. 1, on p. 130, for a full discussion of the principle.

In the case at bar the title passed from Parker West at the confiscation sale in 1864, and vested in the purchaser from the United

States for life of Parker West, with reversion to the heirs at his death, and at his death it vested in them in possession.

When the defendants bought in 1871 the title of Parker West, which was all that in that proceeding the court could or did sell, they bought nothing; his title had passed from him by the act of the law and he had nothing to sell.

The heirs are not claiming an equity as against a conceded legal title; they are asserting a claim to the legal title prior in point of time to that of the defendants, and they are asking the court to set aside a decree fraudulent and void as to them, which obstructs the assertion of their legal title in a court of law.

Gaines *vs.* New Orleans, 6 Wall., 716; Arrison *vs.* Harmstead, 2 Barr., 199 (2 Penn. St.). In Rucker *vs.* Decker, 23 N. J. Eq., 283, Zabriskie, chancellor, says: "The peculiar doctrine of equity as to a *bona fide* purchaser without notice is only applied in a case where it protects the legal title as against an equity of which the purchaser of the legal title had no notice."

And in Walters *vs.* Hill, 27 Gratt., 406, the language of the court is: "And if the decree in favor of his grantor was invalid he was not invested with the legal title and his equity could not prevail over the prior equity of the appellee," p. 456; Lamar *vs.* Hale, 79 Va., 155–'56.

2. There are two cases which sustain the position that a purchaser at a judicial sale, where the defect in his title arises from a matter extrinsic the record, is protected. Reeve *vs.* Kennedy, 43 Cal., 549; Dunkling *vs.* Wilson, 54 Ala., 163, cited in Freeman on Judgments, § 495, § 509.

The reasoning upon which these cases are founded is that often urged—the policy of the law that the public records of the court should be regarded as speaking the truth. The principle is an important one, and when the attack is a collateral one its application cannot be controverted. In Wilcher *vs.* Robertson 78 Va., 610, 611, and 613, it was conceded by the appellee's counsel that the heirs-at-law might attack the decree by direct proceedings; and where a direct attack is made, as in the case at bar, claiming that the court had no jurisdiction over the parties, the question is not, What does the record say? It is, What is the fact; did it or not have jurisdiction over the parties? The principle is clearly stated by Mr. Justice Cole, in Newcombe *vs.* Dewey, 27 Iowa, 381: "Upon principle it seems to us the true question is, Did the court in fact have
21 jurisdiction? Not did the court decide that it had jurisdiction? If it did not in fact have jurisdiction, then its decision is a nullity, and it matters not what facts it finds or what questions it decides, unless there was jurisdiction in fact they are all alike nullities. If without jurisdiction it may not adjudicate the real merits of the case, neither may it adjudicate any other question, whether it be introductory, incidental, or collateral. A judgment becomes a verity and concludes the parties because, and only because, the court pronouncing it had jurisdiction so to do."

The principle upon which these cases in California and Alabama proceed is clearly erroneous. A purchaser for value is entitled to pro-

tection against a mere equity, but the payment of money in good faith by one person does not justify the court in depriving another person of his property "without due process of law." One of these principles is a mere doctrine of a court of equity; the other is a fundamental principle, lying at the foundation of the validity of all the acts of courts. Jurisdiction of the parties is essential to give them validity. If there is conflict between these two principles the fundamental must prevail. Better that a purchaser should occasionally lose his purchase-money by relying upon the records of a court than to establish the principle that the mere recital in a decree can deprive a man of his property, for it is to be remembered that those who claim this protection for the purchaser concede that, in fact, the court did not have jurisdiction of the parties. These views are sustained by the following cases: Harshey *vs.* Blackmarr, 20 Iowa, 161; Newcombe *vs.* Dewey, 27 Iowa, 381; Stone *vs.* Skerry, 31 Iowa, 582; Owens *vs.* Ranstead, 22 Ill., 161, 167; Ridgeway *vs.* Bank of Tenn., 11 Humphreys, 522; Ingle *vs.* McCurry, 1 Heisk., 26; Landrum *vs.* Farmer, 6 Bush., 46; Johnson *vs.* Coleman, 23 Wisc., 452; Miller *vs.* Gooman, 38 Penn. St., 309; Hernandez *vs.* James, 23 La. Ann., 483. In commenting on the cases which assert a contrary doctrine, where the officer has made a false return, Mr. Freeman says: "It would seem to be one of those self-evident axiomatic propositions that might be safely asserted without fear of successful contradiction that no greater fraud can possibly be perpetrated than to deprive a person of his property without giving him an opportunity to be heard in its defence. To do so is repugnant to our sense of natural justice, opposed to the underlying principles of all free governments deriving their authority from a written constitution, and is seldom, if ever, sanctioned, except where might and not right prevails. Yet the authorities just quoted undoubtedly have that effect, for when it is asked, and that, too, of those marvels of wisdom and guardian angels of the rights of persons—courts of equity—to relieve against the commission of such an outrage—fraud *per se*, it might truth-
22 fully be said—and to prevent one man through the medium of courts of justice from confiscating the property of another, their answer is: Inasmuch as you have a cause of action against the officer for making a false return, we will deny you the relief sought, allow the Constitution to be violated, and your property confiscated. Fortunately, however, the authorities quoted have not been followed in this country." Note to Taylor *vs.* Lewis, 19 Am. Decisions, pp. 137–'8.

3. The object to be attained by the doctrine of a purchaser for value was to prevent the purchaser from losing his purchase-money. In the case at bar, if the heirs prevail, the money of the purchasers is on deposit in bank to the credit of the consolidated causes; the money with interest is subject to the order of the court to be repaid them when the title fails. The application of the doctrine in this case would be to make a bad title, confessedly bad, good; to encourage purchasers at judicial sales not to enquire into the validity of the title offered for sale; to wipe out of existence the doctrine of *caveat emptor*.

(8.) The doctrine of estoppel is relied on in the answer of A. P. Thom, trustee (pp. 94, '5, '6, '7 of Record), and in the answer of J. B. Whitehead.

This defence concedes that the plaintiffs are entitled to the relief prayed for in the bill but for the facts pleaded in estoppel, and these facts bar the remedy.

What is the relief asked? It is that the void decrees of May 4th, 1871 and 1872, and the deeds made in pursuance thereof may be set aside and cancelled.

The facts relied upon are that plaintiffs in 1872 executed a deed in which their interest in the proceeds of the sales of the lands in controversy were conveyed to secure the payment of a debt; that they knew of the proceedings taken to sell the lands; that they knew of the purchase of the defendants, and did not warn them or give notice of their claim; that had the defendants known of the claim of the heirs they would not have bought.

As to the deed, an estoppel by deed only applies between the parties to the deed and their privies. McCullough *vs.* Dashiel, 78 Va., 634. The deed does not affect strangers unless they are misled by it. *Ib.*, p. 640. Here it is not even alleged that the defendants knew of it at the time of their purchase.

But regarding the answer as an attempt to plead an estoppel *in pais*—an estoppel by conduct—the facts pleaded lack all of the essentials of such a defence. These essentials, as stated by Mr. Bigelow, are—

23 "1. False representation or concealment of material facts.

"2. Representation made with knowledge of facts.

"3. The party to whom it was made must have been ignorant, actually and permissible, of the truth of the matter.

"4. It must have been made with the intention, actual or virtual, that the other party should act upon it.

"5. The other party must have been induced to act upon it."

P. 522, 3d ed., Bigelow on Estoppel; 2 Herman on Estoppel, § 966.

The gravamen of this species of estoppel is a false representation made with intent to deceive one ignorant of the facts, and that it did deceive or mislead the party to his injury. There is no such allegation in the answers. Not only are these facts essential to be shewn in proof, but they must be properly pleaded. Bigelow on Estoppel, p. 679. If the defence had been set up by plea a demurrer would have been sustained to such a plea alleging only the facts stated in the answer.

(*b.*) We have considered the defence as upon a demurrer admitting the facts.

The evidence does not sustain the answer.

As to the deed, the object was to secure a debt of Parker West and not a debt of the heirs. The Hampton Savings Bank had a large judgment against Parker West. Mr. Lee's per. representative loaned money with which to buy paper of the bank at a large discount with which to pay the debt. The heirs secured Mr. Lee's adm'r

upon land not involved in this controversy, and the deed provided that the land was not to be sold if the proceeds of the sales of P. West's land in the consolidated causes was sufficient to pay Lee's adm'r. In the progress of the cause Mr. Lee's adm'r was paid the amount thus secured. Instead of the bank receiving the whole of its debt he stood as an assignee of the debt of the bank to the extent of the amount advanced by him (p. 270 of Record and p. 531–'2 for the deed). Whatever might be the effect of this transaction had it been known to the purchasers it is not necessary to consider, as it is neither alleged nor proved that it was known to them at the time or that it in any way influenced their conduct.

It is true that the heirs knew that proceedings were taken to sell these lands, but there is nothing in the evidence to shew a knowledge of the purchase made by the defendants. It will be noticed that these sales were private; the land was not sold publicly.

At the time of the sale (1871) the rights of the heirs in the property of their ancestor, which had been confiscated, were uncertain; the legal question was a novel one in this country.
24 Bigelow *vs.* Forrest, 9 Wall., 339, was decided in 1869, and Wallach *vs.* Van Riswick, 92 U. S., not until 1876.

The heirs were without means to undertake the investigation and prosecution of a claim that would in all probability not vest until the opinion of the Supreme Court of the United States was known. (Dep. Mrs. Marrow, p. 411, question 35 on cross-ex.) Under these circumstances they were simply silent; they did nothing to deceive any one or mislead any one, and they yielded nothing.

The facts upon which their claim is based appeared in the record of the consolidated causes under which the purchasers claim.

Each party had the same knowledge of the facts; the point of difference was the law arising upon the facts. There was nothing concealed, nothing misrepresented. 2 Herman on Estoppel, § 957.

The purchasers, if they expected to get a fee-simple title, must have believed that Parker West had an interest in the reversion after his life, as alleged in one of the bills. They so construed the law arising upon undisputed facts; the heirs were ignorant of the law and therefore were silent.

When the highest court of the country decided in 1876 that Parker West had no such interest, but that it vested in the heirs, they asserted their rights. They were not called upon to assert them earlier. Young *vs.* Young, 12 Lea (Tenn.), 335. (Dep. of M. Smith, pp. 414–'18 and p. 421 of Record.) Mere silence under such circumstances will not operate as an estoppel. 2 Herman, § 947.

Silence, like a representation, must not only be misleading; it must actually have misled at the time of purchase. Frederick *vs.* Missouri River R., 82 Mo., 402; Maxwell *vs.* Bay City Bridge, 46 Mich., 278, 282–'3–'4.

It is not even alleged that the silence of the heirs misled the purchasers.

In order to call forth the doctrine of estoppel, especially as to real estate, fraud, either actual or constructive, is an essential

element; there must be an intent to deceive. 2 Herman on Estoppel.

In Henshaw *vs.* Bissell, 18 Wall., 255, Justice Field says: "An estoppel *in pais* is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury. Conduct or declarations founded upon ignorance of one's rights have no such ingredient and seldom work any such result," p. 271.

In Brant *vs.* Virginia Coal and Iron Co., 93 U. S., 326, the
25 doctrine that fraud is essential is affirmed, and Justice Field adds: "It is also essential for its application with respect to the title of real property that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge," p. 337.

And in the case in 93 U. S., just as in the case at bar, the party bought what he supposed was a fee simple, but the court construed it to be only a life estate, and those entitled in reversion were not estopped. The land was sold under a decree of a court in a suit to which the reversioner was a party. On p. 335 Justice Field says: "The purchaser was bound to take notice of the title. He was directed to its source by the pleadings in the case."

The courts have gone farther even than these cases, holding that at a public sale the owner of the legal title, if present, is under no obligation to assert his title. It is only when his title is a concealed one, such as an unrecorded mortgage, that he is bound to speak. 2 Herman, § 964, § 968; Fisher *vs.* Mossman, 11 Ohio St., 42, 47; Hill *vs.* Epley, 31 Penn. St., 32; Knouf *vs.* Thompson, 16 Penn. St., 364; Mason *vs.* Philbrook, 69 Me., 57; Allen *vs.* Kellam, 69 Ala., 442.

(9.) The doctrine of laches and stale claim is relied upon by the defendants as a defence.

This doctrine is generally applied in matters of account where, from the lapse of time, the evidence of the items of account is lost or obscured.

The latest utterance of the court in this State states the doctrine thus: "Where from delay no correct account could be taken, and any conclusion to which the court arrived must be conjectural, and the original transactions have become so obscured by lapse of time, loss of evidence, and death of parties as to render it difficult to do justice, the court will not relieve the plaintiff." Richardson, J., in Wissler *vs.* Craig's Adm'r, 80 Va., p. 29; 1 Barton Ch'y Pr., p. 90, § 23, and cases cited in note.

In the case at bar no account is called for. The rights of the parties, the title to the land, rests upon facts which are undisputed and clear.

The other application of the doctrine is that it affords evidence of an abandonment of the right claimed. Richardson, J., in Massie's Adm'r *vs.* Heiskell's Trustee, 80 Va., p. 805, says: "It is well settled

that laches cannot be predicated of those who are ignorant of their rights. Rowe *vs.* Bently, 29 Gratt., 763. Such defence is, in
26 equity, only permitted to defeat an acknowledged right on the ground of it affording evidence that the right has been abandoned."

The evidence in the case at bar shews that the plaintiffs were ignorant of their rights in the property until 1876. At that time they asserted their rights, claiming title to this land under the decision of Wallach *vs.* Van Riswick, 92 U. S., 202—a decision which, it appears from the answer of the defendants Groome and Kimberly, was fully discussed in the county of Elizabeth City. This claim was made to Geo. M. Peek, one of the special commissioners who sold to the defendants under the decrees in the consolidated causes, and who after that time conveyed title to them. (See dep. of Peek, pp. 524–'5 of Record; dep. of G. M. West, pp. 429–'30; of M. Smith, pp. 421–'3.)

In the exercise of their rights, in Dec'r, 1880, they sold their title in a part of the Newport News tract to C. P. Huntington, who had also bought from the purchasers under the decrees in the consolidated causes, and provided for these purchasers by a contract with Huntington that should they (the heirs) establish their title to these lands he should at all events pay the purchasers $150 per acre. Under this agreement Huntington retained the residue. (See Exhibit "A," pp. 452–'3, and dep. of Bickford, pp. 394–'5.)

In July, 1881, a suit was commenced against the defendants, but it was not prosecuted. In 1883 the heirs employed counsel and in 1885 commenced an action of ejectment for the lands, and when the court decided that the decrees of May 4th, 1871 and 1872, could not be attacked collaterally this suit was brought at once.

The plaintiffs claimed a legal title to the lands. The statute would not bar them in the assertion of this right until May 4th, 1887, fifteen years after the sales were confirmed. They brought their action of ejectment in 1885, two years before expiration of the bar, and as soon as the court held the decrees could not be attacked in a court of law the same day this suit was commenced.

That C. K. Mallory had undertaken to represent them in the consolidated causes came to their knowledge first in the answers and depositions in this cause.

We submit that these facts do not indicate an abandonment of the right of the plaintiffs. They rather justify the assertion that from the time the plaintiffs knew their rights they made a continual claim, and just so soon as it appeared that the aid of a court of equity was necessary to the assertion of their rights they made application at once.

The doctrine of laches does not apply where there is fraud. 1 Barton Ch'y Pr., § 24, and cases cited.

The ground upon which relief is prayed here is fraud; that
27 the decrees of May 4th, 1871 and 1872, were obtained without notice to the plaintiffs, who were not made parties by "due process of law." A decree so obtained, in the language of Mr. Freeman, is a fraud *per se.*

The doctrine of laches cannot apply to Mrs. Marrow, who is and has been a married woman from the beginning of these controversies.

Wherefore your petitioners pray that the said decree may be reviewed by this court and reversed in the several matters complained of.

THE PETITIONERS,
By their counsel, BURROUGHS & BRO.

I, W. W. Gordon, an attorney practicing in the supreme court of appeals of Virginia, am of opinion that it is proper that the said court should review the decrees complained of in the foregoing petition.

WM. W. GORDON.

Appeal allowed upon petitioners giving bond in the penalty of $250 before the clerk of the circuit court of Elizabeth City county, conditioned as the law directs.

T. T. FAUNTLEROY.

To the clerk of the court of appeals, at Richmond, Va.

Transcript of Record.

(Page 1 of MS. record omitted.)

WILLIAM P. MARROW and MARY E., His Wife, GEORGE B. WEST, and MISSOURI SMITH, Plaintiffs,

vs.

JOSEPH B. BRINKLEY, JOHN L. PEEK, JOHN B. WHITEHEAD, A. P. Thom, Trustee, William H. Kimberly, Martin McDevitt, Charles F. Groome and Emma D., His Wife, George W. Schermerhorn, and George Booker, Defendants,

Bill.

28 To the Honorable R. L. Henly, judge of the circuit court of Warwick county:

Humbly complaining, sheweth unto your honor the above-named plaintiffs as follows:

In the year 1831, January 1, Parker West purchased of Elizabeth D. Porter and others a tract of land situate in Elizabeth City county (now in the county of Warwick), called New Port's Noose, and on the same day received from them a deed with general warranty for the said land in fee, described in the said deed as containing 255 acres and bounded on the south by James river, on the west by lands of James Burke, on the north by a creek making out of James river at the east or lower end of said land. Under this deed Parker West occupied and held possession of the said land until some time in the year 1867.

On the 3d of December, 1863, proceedings were instituted in the United States district court for the eastern district of Virginia to

confiscate the said land as property of Parker West, under an act of Congress approved July 17th, 1862, entitled An act to suppress insurrection, to punish treason and rebellion, &c. The land is described in the said proceedings as situate, lying, and being in Elizabeth City county, eastern district of Virginia, bounded on the north by the county road, on the east by Newport's News creek and parish, on the south by James river, and on the west by the land of James Burke. The land described in these confiscation proceedings includes the whole of the land described in the deed of January 1, 1881, and all of the tract now held by the defendants, as hereinafter stated. On the 3d day of June, 1864, the proper preliminaries having been taken, the said land was decreed to be sentenced, condemned, and confiscated, and ordered to be sold by the marshal. The said land was sold by the marshal for $3,150 to J. B. Alexander and John J. Bowen, and a deed executed to them for the said land by the marshal on the 15th day of February, 1865, and duly recorded in the clerk's office of Elizabeth City county on the 11th day of April, 1867, and on the 4th day of June, 1867, the said purchasers were put in possession of the land thus purchased by them, as will more fully appear by a copy of the record of the said court in said proceedings herewith filed, marked Exhibit "A," as a part of this bill. The said purchasers remained in possession of the said tract of land until the death of Parker West, which occurred in December, 1871.

(*a.*) That at the August rules, 1870, Joseph B. Brinkley filed his bill in the circuit court of Elizabeth City county against
29 Parker West and others, alleging that on the 15th day of March, 1861, he had obtained a judgment against John A. Curtis, Thomas Latimer, and Parker West for $400, with interest from Sept. 30th, 1857, and $8.12 costs; that Jno. A. Curtis had been declared a bankrupt and his estate had not and could not pay a dividend; that Thomas Latimer and Parker West had no personal estate, and that executions against them had been returned "no property;" that Thomas Latimer was seized of certain lands situated in Elizabeth —— county, and of certain other lands owned by him jointly with W. R. Willis and others.

(*b.*) That Parker West was seized of various tracts of land in the county of Elizabeth City, numbered from 1 to 7 and described, and that he was entitled to the fee in the foregoing lands, which had been confiscated by what is known as the confiscation law of the United States, to wit, the act of Congress of July 17th, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels," &c., under which act certain proceedings were had in the United States courts and the life estate of said Parker West confiscated and sold, and the possession of said land is now in the purchaser for the life of the said Parker West, and charged that the said judgment being had and docketed according to the requirements of the statutes in such cases made and provided long prior to any proceedings under the said confiscation act, was in no ways affected by it, and was a prior lien, and said lands ahead of any title the purchasers at such confiscation sale may have acquired.

1st. A tract of land in Hampton, at the intersection of S. Back and Queen streets.

2d. A tract of land known as Newport's News, in said county, containing 303¼ acres, bounded by James river, the road, creek, and the lands of Parrish and Burke.

The said bill asked for an account of the annual and fee-simple value of the lands of Thomas Latimer and Parker West, of the liens thereon and their priorities, and that so much of the said lands as were necessary should be sold to pay the said debt.

(*c.*) At the same rules, in 1870, John L. Peek, as surviving partner of himself and Thomas Peek, filed his bill against Parker West and Geo. B. West, trustee, alleging that at the March term, 1867, of the circuit court of Elizabeth City county, he had obtained a judgment against Charles Jones and Parker West for $70, with interest and costs, and at the same term of the said court other judgment *were* obtained against Parker West and others; that the said Parker West was seized of a large real estate in the county of Elizabeth City, to wit:

"1st. The reversion after an estate for his life, which was confiscated and sold by authority of the United States during the late civil war, in a tract of land known as Newport News, situate on James river, and bounded on the east by Newport News creek, west by the lands of Burke's devisees, south by the James river, and north by the lands of Burke's devisees and Geo. Melson's grantees, containing 393 acres, more or less.

"2d. The absolute fee in a certain other tract of land called 'Casey's,'" &c.

That on the 14th day of March, 1867, before any of the said judgments were obtained, Parker West conveyed the tract of land known as Newport News to Geo. B. West, in trust, to secure certain creditors therein, and praying that an account be had of the real estate owned by Parker West, its value, and of the liens thereon, by judgment or otherwise, and that so much of the said lands as were necessary might be sold to pay the debts of the plaintiffs and others in the order of their priorities.

(3.) That at the September term, 1870, of the said circuit court of Elizabeth City county the said suits of Brinkley *vs.* Latimer and West and Peek *vs.* West and West were consolidated with another suit pending in said court under the style of Willis *et als. vs.* Latimer *et als.*, the object of the latter suit being to affect a partition of lands held jointly by Latimer, Willis, and others, so that in the first suit named it might be ascertained what portion of the lands owned by Latimer could be applied to the payment of the plaintiff's debt in the first suit.

And in these consolidated causes a decree was made for an account of the annual and fee-simple value of the lands of Latimer and Parker West, and of the liens thereon; and as to Parker West's lands the commissioner was directed to report "the claim of title to any party for any portion thereof and the character and circumstances attending the same. "Under this decree Commissioner Howard made a report showing the liens by judgment against Parker West

to a large amount, principal, interests, and costs, up to May 1, 1871. Many of these judgments were also liens on the lands of Thomas Latimer, and a large portion of them—more than one-half of them—were judgments against Parker West as surety or endorser for others.

This report shewed that Parker West was the owner of nine (9) different tracts of land. Tract No. 4 of the said lands, known as the "Newport News" tract, was reported by the commissioner to be in the possession of J. B. Alexander and J. J. Bowen, under
31 a title derived from the marshal of the United States district court of Virginia, having been sold under what is known as the "confiscation act," in 1864. The fee-simple value of said tract was reported to be $9,097.50 and its annual value $350.

(4.) On the 4th day of May, 1871, a decree was entered in the said consolidated causes confirming the report of Commissioner Howard and directing Thomas Tabb, Charles K. Mallory and Geo. M. Peek, as special commissioner, to sell seven (7) tracts of land owned by Parker West. Included in this number was "all the interest of Parker West in that certain tract of land known as Newport News."

The said special commissioner was directed to except from the sale of the Newport News tract 50 acres alleged to have been sold to A. J. Ford and a tract also alleged to have been sold to Geo. B. West by the said Parker West.

(5.) The plaintiffs allege that at the time the suits of Brinkley *vs.* Latimer and West and Peek *vs.* West and West were begun and at the date of said decree of sale all the right, title, and interest of Parker West in the said tract of land known as "Newport News" had been divested by the confiscation proceedings mentioned in the first paragraph in this bill, and that he had no estate whatever in said lands; that J. B. Alexander and J. J. Bowen, the purchasers of the said tract of land at the confiscation sale, and the plaintiffs and Lizzie B. West, the children of Parker West and the heir presumptive of Parker West, were the only persons who had any estate in the said lands; that the said circuit court of Elizabeth City county had no power or jurisdiction to decree a sale of the said tract of land and vest in the purchaser a fee-simple title unless they were parties to the said suit; that these persons, essentially parties, were not only not served with process in said suit, but the plaintiffs did not even ask in their bills that they should be made parties. They charge that the said decree of May 4th, 1871, is absolutely null and void for want of jurisdiction over the persons of the only parties who had any estate in the said lands or any interest therein; and they claim that the said decree and proceedings had before the said decree being a nullity, no act done in pursuance of the said decree is valid; that the sales made under it and the deeds made to the purchasers hereinafter named are void, and that no subsequent decree or order made in the said consolidated causes did or could give any validity to said void decree.

(6.) At the November term, 1871, of the said court the special commissioners reported that they had sold lands of Parker
32 West other than the Newport News land, whose sales amounted to $860, and the lands of Thomas Latimer, whose sales

amounted to $437.14. They also reported that sales had been made by Parker West to Geo. B. West of 12 acres of the Newport News tract at $1,200 and to A. J. Ford of 60 acres of the same tract at $5,000, and all of said sales were confirmed by the court.

At the May term, 1872, the special commissioners reported sales to various persons of portions of the Newport News tract according to a plat and survey made by William Ivy, a copy of which is herewith filed, marked "B," and at a subsequent term they reported a sale of the residue of the said tract to J. B. Whitehead and Jno. S. Tucker, all of which sales were confirmed.

The portions of the said tract now in controversy and so sold are five (5) acres included in lot No. 2 to C. F. Groome and Emma F., his wife; three (3) acres, undivided, in lot No. 4 to W. H. Kimberly; one-half ($\frac{1}{2}$) acre in lot No. 5 to Martin McDevitt; twenty and a half ($20\frac{1}{2}$) acres, the whole of lot No. 8, to J. B. Whitehead and Jno. S. Tucker.

In December, 1871, Parker West died intestate, leaving Geo. B. West, Elizabeth R. West, Missouri Smith, and Mary E. Marrow, his children and heirs-at-law, surviving; and Elizabeth R. West died in the year 1885 intestate, unmarried, and without issue.

At the period of the death of Parker West the plaintiffs did not know what were their rights in his lands which had been confiscated. Even in the legal profession different views were entertained on the subject, some contending that the fee vested in the purchaser at the confiscation sale; others that the purchaser only took an estate for the life of Parker West, and that Parker West held a reversion after his life which was subject to his debts, and some that the purchaser took an estate for the life of Parker West, and at his death his heirs were entitled to the estate free from his debts, as to which there was no lien acquired prior to confiscation. In this condition of affairs the plaintiffs determined to do no act yielding their rights in the premises, and so far as they know they have done nothing which could be construed as a waiver of their rights in the confiscated lands of Parker West.

In 1876 they learned of the decision of the Supreme Court of the United States in the case of Wallach *vs.* Van Riswick, holding, as they were informed, that the effect of the confiscation was to vest in the purchaser at the confiscation sale the title to the land of the offender for his life, and that at his death his heirs became entitled to the same absolutely. In the latter part of the year 1880
33 C. P. Huntington purchased from the various parties who claimed title to the Newport News tract under the decrees in the aforesaid consolidated causes all of the Newport News tract except 49 acres. This purchase was made by taking an option from each purchaser for a definite period, and before the expiration of the option he purchased also from the West heirs, as hereinafter stated, which were held as to 20 acres by Geo. B. West, 5 acres by C. F. Groome and Emma F., his wife, 3 acres by W. H. Kimberly, $\frac{1}{2}$ acre by Martin McDevitt, and $20\frac{1}{2}$ acres by John B. Whitehead.

At the same time C. P. Huntington proposed to the heirs of Parker West to purchase their right to the same lands. At this time the

extension of the Chesapeake and Ohio railway had not been made to Newport News, but it was looked upon as the prospective terminus. Negotiations were pending for some time, the parties not being able to agree upon the price. Finally C. P. Huntington offered for the land $8,000, and declared that the terminus of the railroad should not be located at Newport News unless he could purchase the title of the plaintiff to this land. Under these circumstances, believing that the price offered was largely in excess of the value of the land for agricultural purposes and that its value by reason of its proximity to the terminus of a projected railway was about to be lost by a change of location which would affect other lands owned by them, they sold to C. P. Huntington the said lands for $8,000, as will appear by their deed of December, 1880, a copy of which is herewith filed, marked "C."

(7.) On the 4th day of May, 1872, the first term of the said circuit court of Elizabeth City county after the death of Parker West, a decree was entered in the said consolidated causes beginning as follows:

"The death of Parker West being suggested, on the motion of William P. Marrow and Mary E., his wife, Elizabeth R. West, George B. West, M. Smith, and Missouri, his wife, the said Mary E. Marrow, Elizabeth R. West, G. B. West, and Missouri Smith, being the heirs-at-law of the said Parker West, to be made parties defendant to these causes, the said William P. Marrow and Mary E., his wife, E. R. West, G. B. West, and M. Smith and Missouri, his wife, are hereby made parties defendant to these causes.

"This cause then this day again came on to be heard upon the papers formerly read and the report of Special Commissioner C. K. Mallory, Thomas Tabb, and G. M. Peek of the sales made by them under a former decree in these causes, to which report no exceptions have been filed, and was argued by counsel.

"On consideration whereof the court doth adjudge, order,
34 and decree that the said report and the sales reported therein be, and the same are hereby, confirmed."

And in another part of the said decree it is ordered—

"That George M. Peek do check for the further sum of two hundred dollars, being the amount allowed to said G. M. Peek by the heirs of the said Parker West, as appears by written consent of counsel, for extra services rendered in the sales of said land, said amount of sales being in excess of debts due by Parker West, deceased, and reported in the third of these causes."

The plaintiffs allege that at the time the said decree was entered they had no knowledge whatever of its contents; that they had not employed counsel to represent them in the said suits, and that they never authorized any attorney-at-law or any other person to act for them in the said suits, and, as no process was ever served upon them requiring them to appear in said suits and defend their rights, they did not suppose any decree could be entered affecting their rights.

The plaintiffs first learned that they were considered parties to these causes in the year 1876, after the decision of Wallach *vs.* Van Riswick. At the house of Mrs. Stores, in Hampton, this decision

was the subject of conversation, when Elizabeth R. West said, "Then we will get our Newport News lands back." G. M. Peek, who was present, said, "No; you were parties to the suits in which the lands were sold." She at once denied that the heirs had been made parties to the suits.

In the year 1881 they employed Mess. Burroughs & Bro. to examine the proceedings had in the United States court and this court touching their rights to the Newport News tract, and in 1885 they authorized them to commence suit for the land, and it was in this year for the first time that they were informed of the exact nature of the decree of May, 1872, and of its recitals, and even then they did not suppose it would be claimed that they in person asked the court to make the said decree allowing them to become parties to the said suits. They learned of this construction of the decree only at the trial of the suit in ejectment hereafter mentioned.

(8.) The plaintiffs allege that the recitals in the said decree of May 4th, 1872, mentioned in the foregoing paragraph of this bill, are false; that no one of the parties named ever appeared in the said court in person and made the said motion; that on the day named no one of them was in the town of Hampton; that no one of them ever employed an attorney-at-law to represent them in the said causes, to make the said motion, or to protect their rights as heirs of Parker West, nor did all of them or a part of them ever do any of the acts enumerated.

Nor did they ever in person or by attorney authorize the agreement mentioned in said decree to pay $200 to G. M. Peek. The said decree must have been obtained by some one claiming to represent the heirs of Parker West, who imposed upon and deceived the court, who was *is* unknown to the plaintiffs. This decree was a fraud upon the rights of the plaintiffs and a fraud upon the court. The plaintiffs in the said consolidated causes obtained the benefit of this fraud, and the defendants, who have possession of part of the Newport News tract, are claiming the benefit of this fraud. They rest their title upon the fraudulent decree and ask that a court established for the purpose of administering justice should become an instrument in perpetuating a fraud and thereby depriving the plaintiffs of their property without a hearing and without "due process of law."

(9.) The plaintiffs allege that had all the proceedings in said consolidated causes been regular up to the 4th day of May, 1872, that upon the death of Parker West the said proceedings were suspended, and that these proceedings could only be revived against the plaintiffs, the heirs-at-law of Parker West, by a bill of revivor, with due service of process upon the heirs, or a *scire facias* issued in the mode prescribed by the statute in such cases made and provided and served upon the heirs; that such steps were not taken in said consolidated causes, and at the May term, 1873, the second term after the suggestion of the death of Parker West, the said causes should have been discontinued.

(10.) On the 23d of April, 1880, Geo. M. Peek, special commissioner, reported to the court that he had drawn upon the fund to

the credit of the consolidated causes in the Marine Bank of Norfolk, by virtue of the decree of October 22, 1878, in favor of Elizabeth R. West for the sum of $294, in favor of Mary E. Marrow, the wife of Wm. P. Marrow, for $294, and in favor of Missouri Smith for the sum of $294.

The statements are not true. The facts are these: The checks were drawn by G. M. Peek in favor of these parties and given to G. B. West to deliver them. The parties refused to accept them, and G. B. West started to Hampton to redeliver them to G. M. Peek. On his way he lost them. He stated to G. M. Peek what had occurred and requested him to notify the bank and stop the payment of the checks should any one attempt to collect them.

36 The account kept with the Marine Bank of Norfolk and the consolidated causes, a copy of which is herewith filed, marked "D," and the vouchers for sums drawn, shews that no such checks were ever paid. The balance on deposit in said bank on the 1st of July, 1885, was $6,341.75.

The account kept with the Citizens' Bank of Norfolk and the said causes, a copy of which is herewith filed, marked "E," shews that no such checks were paid in that bank. The balance on deposit in said bank on the 1st of July, 1885, was $2,128.66.

The plaintiffs have always refused to accept payment of the proceeds of the sale of the lands of Parker West sold in these causes as his heirs-at-law, because they claimed that they had title to the land itself, and they were unwilling to accept anything in lieu thereof.

The written agreement to pay to G. M. Peek $200, mentioned in paragraph "8" of this bill, said to be made by their counsel, they have never been able to find. It has been lost from the papers in the said consolidated causes, if such paper ever existed. They have enquired for the said paper of the clerk of the court, who has made diligent search therefor, but has been unable to find it. They never authorized any attorney-at-law to execute such a paper for them.

(11.) In the year 1885 the plaintiffs and Elizabeth R. West instituted an action of ejectment against C. F. Groome and Emma, his wife, for 5 acres, part of lot No. 2, Ivy's plat; W. H. Kimberly for 3 acres, part of lot No. 4; Martin McDevitt, ½ acre, part of lot No. 6, and John B. Whitehead and A. P. Thom, trustee, for lot No. 8, twenty and a half acres. The suit was commenced in the county of Warwick and moved by assent to the county of Elizabeth City.

On the trial of the said suit the said parties, who on their own motion were allowed to appear and defend in the place of the defendant in possession, upon whom the declaration had been served, claimed a fee-simple title to the said tracts of land under deeds executed to them by G. M. Peek, special commissioner under decrees entered in the said consolidated causes after May 4th, 1872, which deeds they offered in evidence, together with a copy of the record of the said consolidated causes.

The plaintiffs then offered to prove by G. B. West, Mary E. Marrow, and Missouri Smith the facts stated in the 8th, 9th, and 10th paragraphs of this bill as to the false recitals of said decree of May

4th, 1872, and its fraudulent character, and, being sworn, they did each of them so testify; but it was claimed by the defendants
37 that the said decree was a domestic decree alleging that the parties named had voluntarily appeared in open court in proper person and asked to be made parties to said consolidated causes, and that no evidence could be heard to attack or impeach said decree in a collateral suit, and the court so ruled and excluded said evidence, and thereupon the plaintiffs were advised to submit to a nonsuit, which was done.

(12.) The plaintiffs allege that no process was ever served upon them in the said consolidated causes prior to said decrees of May, 1871, and May 4th, 1872, or since that time, and the recitals in the latter decree as to their appearance being false; that the said court at no time in the said proceedings had any jurisdiction over the persons of the plaintiffs, in whom after the death of Parker West the fee-simple title to said lands known as the Newport News tract vested, and in whom before his death the reversion vested, and they claim that the decrees authorizing the sale of said lands, the decrees confirming said sales and directing deeds to be made to the defendants, Groome, Kimberly, McDevitt, and Whitehead, and the said deeds are absolutely void for want of jurisdiction in the said court of Elizabeth City county over the plaintiffs, the heirs-at-law of Parker West, yet they are clouds upon their title and obstruct their proceedings at law to obtain possession of said lands.

(13.) They have been informed that C. F. Groome and Emma, his wife, have conveyed one-fourth ($\frac{1}{4}$) of an acre, part of the said 5 acres in lot No. 2, to George Booker, and the same quantity of said land to Geo. W. Schermerhorn, and that John B. Whitehead has conveyed the said 20½ acres, lot No. 8, to A. P. Thom, trustee.

The plaintiffs waived an answer under oath to this bill. Prior to the institution of the action of ejectment the plaintiffs offered through their counsel to pay to C. F. Groome, W. H. Kimberly, and Jno. B. Whitehead or A. P. Thom, his trustee, the full amount of the purchase-money paid by them to the special commissioner in the said consolidated causes, with interest from the time of payment, if they would release to them the title obtained through the deeds of the special commissioner and deliver to them possession of the said land. This offer was declined, but it is here again made. They allege that the amount of money now on deposit to the credit of the said consolidated causes is more than sufficient to reimburse the said parties the amount of their purchase-money and interest thereon, and that all the debts of Parker West due the plaintiffs in said causes have been paid.

38 At the trial of this cause the plaintiffs will offer to read so much of the record of the said consolidated causes or a copy thereof as shall appear pertinent to the cause.

The plaintiffs pray as follows:

1. That Joseph B. Brinkley, Thomas L. Peek, C. F. Groome and Emma F., his wife, W. H. Kimberly, Jno. B. Whitehead, A. P. Thom, Geo. Booker, and Geo. B. Schermerhorn may be made parties defendant to this bill and required to answer the same as fully and

particularly as if the allegations thereof were here again repeated and they thereto specially interrogated.

2. That the said decrees of May 4th, 1871, and May 4th, 1872, may be vacated, annulled, and set aside and declared void and of no effect to vest in the defendants any right or title whatever to the lands described in this bill.

3. That the said deeds executed by G. M. Peek, special commissioner, to C. F. Groome and Emma F., his wife, for the said five acres, part of lot No. 2; to W. H. Kimberly for three acres, part of lot No. 4; to Martin McDevitt for half an acre, part of lot No. 6, and to Jno. B. Whitehead for lot No. 8, twenty and a half acres, may be declared void for want of authority in said special commissioner to execute such deeds.

4. That proper process may issue, and that they may have all such other further and general relief as the nature of their case may require or to equity shall seem meet.

And they will ever pray, &c.

BURROUGHS & BRO.,
Counsel for the Plaintiffs.

G. B. West makes oath that the facts stated in the foregoing bill so far as made upon his own knowledge are true, and so far as made upon information he believes to be true.

GEO. B. WEST.

Subscribed and sworn to before me, in the city of Norfolk, this 30th day of January, 1886.

JNO. J. BURROUGHS,
Notary Public.

39 EXHIBIT "A."

Office U. S. district attorney for the eastern district of Virginia.

NORFOLK, VA., *Dec.* 3, 1863.

To the marshal of the United States for the eastern district of Virginia:

In compliance with general instructions issued by the Attorney General under the act of July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," I have to direct that you seize all the right, title, interest, and estate of Parker West in and to all that piece or parcel of land, with the house and buildings thereon, situate, lying, and being in Elizabeth City county, eastern district of Virginia, bounded as follows: On the north by the county road, on the east by Newport News creek and Parish, on the south by James river, and on the west by the land of James Burke, together with all the goods, chattels, and personal property of the said Parker West in and upon the said premises, together with all the improvements, buildings, rights, privileges, appurtenances, and other hereditaments to the same belonging or in anywise appertaining,

and all right, title, interest, and estate of Parker West therein, as proceedings are to be instituted to secure the confiscation of the same to the use of the United States under the above-entitled act. You will report the seizure to me when the same shall have been made.

L. H. CHANDLER,
U. S. District Attorney.

Endorsed: No. 94. Order of seizure. Parker West.

UNITED STATES MARSHAL'S OFFICE, *Feb'y* 22, 1864.

I certify that I have seized the within-described property and given notice to the tenant in possession as within directed.

JOHN UNDERWOOD,
U. S. Marshal,
Per W. G. WEBBER, *D. M.*

Filed March 1, 1864.

W. H. BARRY, *Clerk.*

40 To the judge of the district court of the United States for the eastern district of Virginia:

This is the libel of information of L. H. Chandler, United States attorney for the eastern district of Virginia, in behalf of the Government of the United States against all the right, title, interest, and estate of Parker West in and to all that piece or parcel of land, with the house and buildings thereon, situate, lying, and being in Elizabeth City county, eastern district of Virginia, bounded on the north by the county road, on the east by Newport News creek and Parish, on the south by James river, and on the west by the land of James Burke, together with all the goods, chattels, and personal property of the said Parker West in and upon the said premises, together with all his right, title, and interest in and to the improvements, buildings, rights, privileges, appurtenances, and other hereditaments to the same belonging or in any way appertaining, and against all persons lawfully intervening for their interest therein; and thereupon the said L. H. Chandler, United States attorney as aforesaid, doth allege and articulately propound as follows:

I. That certain States forming a part of the territory and constituting a part of the Government of the United States, and specifically enumerated by the President of the United States in his proclamation duly issued and bearing date the first day of July, A. D. eighteen hundred and sixty-two, are engaged in armed rebellion against the lawful authority of the United States.

II. That by the act of Congress of the United States approved the seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," provision was made for the seizure and confiscation of the property of persons engaged in armed rebellion against lawful authority of the United States, as therein set forth.

III. That the President of the United States did, on the twenty-

fifth day of July, in the year of our Lord eighteen hundred and sixty-two, issue his proclamation warning all persons within the contemplation of the sixth section of the said act of Congress of July 17, A. D. 1862, to cease from participating in, aiding, countenancing, and abetting the existing rebellion against the Government of the United States, as provided for by said act.

41 IV. That Parker West, on the said seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, was and previously thereto had been the owner of real estate in said Elizabeth City county, Virginia, described as follows: All that piece or parcel of land, with the house and buildings thereon, situate, lying, and being in Elizabeth City county, eastern district of Virginia, bounded on the north by the county road, on the east by Newport News creek and Parish, on the south by James river, and on the west by the land of James Burke, together with all the goods, chattels, and personal property of the said Parker West in and upon the said premises, together with all the improvements, buildings, rights, privileges, appurtenances, and other hereditaments to the same belonging or in anywise appertaining.

V. That the said Parker West subsequently to the said seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, held and exercised an office and agency of honor, trust, and profit under the government of the so-called Confederate States and under one of the said several States of said Confederacy and under the laws thereof, and that the said Parker West accepted the appointment and was elected to said office and agency after the date of the president's ordinance of State, and did take an oath of allegiance to and to support the constitution of the so-called Confederate States.

VI. That the said Parker West, owning property in said Elizabeth City county, Va., as aforesaid, has since the said seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, assisted and given aid and comfort to the rebellion and to those engaged in the rebellion against the lawful authority and against the Government of the United States, in this, that the said Parker West did, on the eighteenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, and at various other times between that date and the date of the filing of this libel of information, give aid and comfort to said rebellion by acting as a soldier and as an officer and as a non-commissioned officer in the army and navy of the so-called Confederate States, and by contributing money and property to the aid and encouragement of those engaged in the rebellion against the lawful authority of the United States and to the government of the so-called Confederate States.

VII. That the said Parker West, on the eighteenth day of July, in the year of our Lord one thousand eight hundred and

42 sixty-two, was engaged in armed rebellion against the Government of the United States and in aiding and abetting such rebellion, and, notwithstanding that the President of the United States, on the 25th day of July, eighteen hundred and sixty-two, did issue his proclamation as aforesaid, warning all persons within

the contemplation of the sixth section of the said act of Congres of July the seventeenth, eighteen hundred and sixty-two, to cease participating in, aiding, countenancing, and abetting such rebellion, the said Parker West did not within sixty days after the said proclamation was duly given and made cease to aid, countenance, and abet such rebellion, and did not return to his allegiance to the United States.

VIII. That the said property herein described has been seized by the United States marshal for the eastern district of Virginia in compliance with instructions issued by the Attorney General to district attorneys of the United States, and by virtue of the fifth section of the act approved on the 17th day of July, in the year of our Lord one thousand eight hundred and sixty-two, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."

IX. That by reason of the premises the property herein described became and was forfeited to the United States and ought to be condemned — their use.

Wherefore prayer is hereby made to your honor that process of monition may issue against the owner and owners of the property herein described, and against all persons interested or claiming an interest therein, warning them at some early day, to be therein named, to appear and answer this libel of information; and, the owner of said property being absent and non-resident, prayer is further made for order of publication in the usual form, and for such further and other relief as to law and justice may appertain and as this court is competent to give in the premises.

March 1, 1864.

(Signed) L. H. CHANDLER,
U. S. Attorney.

Endorsed: 94. U. S. district court for Eastern — Virginia, at Norfolk, Va. United States *vs.* All the Right, Title, Interest, and Estate of Parker West. Libel of information. Filed March 1, 1864. W. H. Barry, clerk.

43 *Confiscation.*

District Court of the United States for the Eastern District of Virginia.

THE UNITED STATES
vs.

ALL THE RIGHT, TITLE, INTEREST, AND ESTATE OF PARKER WEST IN and to All that P ece or Parcel of Land, with the House and Buildings Thereon, Situate, Lying, and Being in Elizabeth City County, Eastern District of Virginia, Bounded on the North by the County Road, on the East by Newport's News Creek and Parish, on the South by James River, and on the West by the Land of James Burke, together with All the Goods, Chattels, and Personal Property of the said Parker West in and upon the said Premises.

On reading and filing the libel in this case the court orders that

process of monition issue as prayed, and appoints the second Tuesday of April, 1864, and the court-room in the city hall, in the city of Norfolk, as the time and place of trial of this cause; and also orders that notice of said time and place of trial and of the substance of the said libel be given by publication thereof in the "Old Dominion," a newspaper published in the city of Portsmouth, and also posting up the same at the city-hall door, in the said city of Norfolk, and that proclamation of the pendency of this suit be made by the marshal at the city-hall door two times weekly until the day of trial.

JOHN C. UNDERWOOD,
District Judge.

Endorsed: No. 94. United States *vs.* All the Right, Title — Parker West. Order for process, &c. Returnable. Filed and entered March 1, '64. W. H. Barry, clerk.

The President of the United States to the marshal for the eastern district of Virginia, Greeting:

You are hereby commanded to give public notice, at least fourteen days before the day of trial hereinafter mentioned, by advertisement in the "Old Dominion," a newspaper published in the city of Portsmouth, and by posting up a notification at the city-hall door, in the city of Norfolk, and by proclamation at said city-hall door twice a week till the day of trial aforesaid, that L. H. Chandler, at-
44 torney of the United States for said district, has caused all the right, title, interest, and estate of Parker West in and to all that piece or parcel of land, with the house and buildings thereon, situate, lying, and being in Elizabeth City county, eastern district of Virginia, bounded on the north by the county road, on the east by Newport News creek and Parish, on the south by James river, and on the west by the land of James Burke, together with all the goods, chattels, and personal property of the said Parker West in and upon the said premises, to be seized by you as forfeited to the United States; that he did on the 1st day of March, 1864, file in the clerk's office of said district court a libel of information on behalf of the United States against the said tract of land and personal property, and against all persons lawfully intervening for their interest therein, and for the causes in said libel set forth, praying for condemnation of the same to the use of the United States, and that said court has appointed the second Tuesday of April, 1864, and the court-room in the city hall in the said city as time and place for the trial of said cause, when and where all persons interested in said tract of land and personal property, or claiming an interest therein, may appear and make their allegations in that behalf.

Herein fail not, and make return of this warrant into said clerk's office without delay, so endorsed as to show the time and manner of its execution by you.

Witness the Honorable John C. Underwood, United States district judge for the eastern district of Virginia, this 1st day of March, A. D. 1864.

WM. H. BARRY, *Clerk.*

Endorsed: No. 94. United States *vs.* All the Right, Title, and Interest — Parker West. Monition. Returnable2d Tuesday Ap'l, '64. Issued March 1, '64. I hereby certify that I have caused the notice to be published, posted, and proclaimed as herein commanded. Norfolk, Va., Ap'l 12th, 1864. John Underwood, U. S. marshal, per W. G. Webber, D. M. Filed April 12, 1864. Wm. H. Barry, clerk.

District Court of the United States for the Eastern District of Virginia.

To Parker West and to all whom it may concern, Greeting:

Notice is hereby given that on the 22d day of February,
45 1864, all the right, title, interest, and estate of Parker West in and to all that piece or parcel of land, with the house and buildings thereon, situate, lying, and being in Elizabeth City county, eastern district of Virginia, bounded on the north by the county road, on the east by Newport News creek and Parish, on the south by James river, and on the west by the land of James Burke, together with all the goods, chattels, and personal property of the said Parker West in and upon the said premises, was seized by the marshal of the United States for said district as forfeited to the use of the United States, and the same is libelled and prosecuted in this court in the name of the United States for condemnation for the causes in the said libel set forth, and that said cause will stand for trial at the court-room in the city hall, in the city of Norfolk, on the second Tuesday of April next, when and where all persons are warned to appear to show cause why condemnation should not be decreed and to intervene for their interests.

Dated March 1st, 1864.

WM. H. BARRY, *Clerk.*

Endorsed: No. 94. United States *vs.* All the Right, Title — Parker West. Notice of seizure and libel and time and place of trial. Filed March 1, 1864. Wm. H. Barry, clerk.

District Court of the United States for the Eastern District of Virginia.

R. E. Glassett, of the city of Portsmouth, being duly sworn, deposes that he is one of the publishers and proprietors of "The Old Dominion," a daily newspaper published in the city of Portsmouth, and that a notice, of which the annexed is a true and correct copy, was published in said newspaper fourteen times prior to the 11th day of April, 1864, the first insertion being on the 11th day of March, 1864, and the last on the 30th day of March, 1864.

R. E. GLASSETT.

Fees for publication, 250 words, $7.50.

Subscribed and sworn to before me this 2d day of June, 1864.

W. H. BARRY, *Clerk.*

District Court of the United States for the Eastern District of Virginia.

To Parker West and to all whom it may concern, Greeting:

Notice is hereby given that on the 22d day of February,
46 1864, all right, title, interest, and estate of Parker West in and to all that piece or parcel of land, with the house and buildings thereon, situated, lying, and being in Elizabeth City county, eastern district of Virginia, bounded on the north by the county road, on the east by Newport's News creek and Parish, on the south by James river, and on the west by the land of James Burke, together with all the goods, chattels, and personal property of the said Parker West in and upon the said premises, was seized by the United States marshal for said district as forfeited to the use of the United States, and the same is libeled and prosecuted in this court in the name of the United States for condemnation for the cause in the said libel set forth, and that said cause will stand for trial at the court-room in the city hall, in the city of Norfolk, on the second Tuesday of April next, when and where all persons are warned to appear to show cause why condemnation should not be decreed and to intervene for their interest.

Dated March 1, 1864.

W. H. BARRY, *Clerk.*

Endorsed: No. 94. United States *vs.* Parker West. Proof pub. notice. Filed June 21, 1864. W. H. Barry, clerk.

PROVOST MARSHAL OFFICE, 2ND DISTRICT,
RICHMOND, VA., *April 14th*, 1865.

I do hereby certify that on the 14th day of April, 1865, at Richmond, Va., the oath prescribed by the President of the United States in his proclamation of December 8, 1863, was duly taken, subscribed, and made matter of record by Parker West at Richmond.

W. KUNTZER,
Lt. Col. 88th N. Y. Vols. and Dist. Pro. Mar.

Endorsed: 94. 79. Parker West. Oath of allegiance. Filed June 6, 1865. Wm. H. Barry, clerk.

At a special term of the district court of the United States of America for the eastern district of Virginia, held at the court-room in the city hall, in the city of Norfolk, on Friday, the
47 3d day of June, in the year of our Lord one thousand eight hundred and sixty-four.

Present: The Honorable John C. Underwood, district judge.

Confiscation.

UNITED STATES
vs.
ALL THE RIGHT, TITLE, INTEREST, AND ESTATE OF PARKER West in and to All that Piece or Parcel of Land, with the House and Buildings Thereon, Situate, Lying, and Being in Elizabeth City County, Eastern District of Virginia, Bounded on the North by the County Road, on the East by Newport's News Creek and Parish, on the South by James River, on the West by the Land of James Burke, together with All the Goods, Chattels, and Personal Property of the said Parker West on and upon the said Premises. } No. 94.

The papers in this cause having been heretofore returned, the usual proclamation having been made, the default of all the parties being duly entered, and, notwithstanding said default, witnesses having been called and examined by L. H. Chandler, attorney for the United States, and due deliberations being had on the pleadings and proofs, it is thereupon, on motion of the said L. H. Chandler, ordered, adjudged, sentenced, and decreed by the court that the real and personal property mentioned and described in the libel in this cause be, and the same accordingly is, confiscated and condemned as forfeited to the United States; and, upon like motion, it is further adjudged, ordered, and decreed that the clerk of this court issue a decree of *venditioni exponas* to the marshal of the district, returnable according to law, and that the said marshal, after having given at least ten days' notice of the time, place, and terms of sale of the personal property by publication thereof in one of the newspapers published in the city of Norfolk, Va., and at least twenty days' notice of the time, place, and terms of sale of the real estate by publication thereof in one of the newspapers published in the city of Norfolk, Va., in one of the newspapers published in the city of Washington, D. C., and in one of the newspapers published in the city of New York, sell the said property at public sale, for cash, to the highest bidder, and bring the proceeds of said sale into this court for its action thereon.

JOHN C. UNDERWOOD,
Dist. Judge.

48 Endorsed: 94. United States *vs.* All the Right, &c., — Parker West. Decree. Filed and entered June 3, 1864. Wm. H. Barry, clerk.

UNITED STATES OF AMERICA, *District of Virginia*, } *ss:*

The United States of America to the marshal of the — district of Virginia, Greeting:

Whereas a libel was filed in the district court of the United States

for the eastern district of Virginia, at Norfolk, on the 1st day of March, in the year of our Lord one thousand eight hundred and sixty-four, by L. H. Chandler, United States district attorney for said district, against all the right, title, interest, and estate of Parker West in and to all that piece or parcel of land, with the house and buildings thereon, situate, lying, and being in Elizabeth City county, eastern district of Virginia, bounded on the north by the county road, on the south by James river, and on the west by land of James Burke, together with all the goods, chattels, and personal property of the said Parker West in and upon the said premises, praying that the same may be condemned and sold for causes in the said libel alleged; and whereas the said real estate and personal property has been attached by the process issued out of the said district court in pursuance of the said libel and is now in custody by virtue thereof, and such proceedings have been thereupon had that by the decree of the said court in this cause made and pronounced on the 3rd day of June, in the year of our Lord one thousand eight hundred and sixty-four, all the right, title, interest, and estate of Parker West in and to said real estate and personal property was condemned and ordered to be sold by you, the said marshal, after giving ten days' notice of sale, according to law of personal property, by publication thereof in one of the newspapers published in the city of Norfolk, Va., and twenty days' notice of the sale of real estate by publication thereof in one of the newspapers published in the city of Norfolk, Va.; in one of the newspapers published in the city of Washington, D. C., and in one of the newspapers published in the city of New York:

Therefore you, the said marshal, are hereby commanded to cause all the right, title, interest, and estate of Parker West in and to said real estate and personal property, so condemned and ordered to be sold, to be sold in the manner and form upon the notice and
49 at the time, place, and upon the terms by law required, and that you have the money accruing from said sale in said court, at Norfolk, on the 19th day of January, eighteen hundred and sixty-five, and that you then pay the same to the clerk of the court.

And have you also then and there this writ.

Witness the Honorable John C. Underwood, judge of the said court, at Norfolk, in the — district of Virginia, this 19th day of November, in the year of our Lord one thousand eight hundred and sixty-four, and of our Independence the eighty-.

W. H. BARRY, *Clerk.*

(1.) Endorsed: No. 94. District court of the United States, eastern district of Virginia. United States *vs.* All the Right — Parker West.

Vend. exponas.

Amount due ---------- $
" costs ----------
" proctor's fee ----------

Collect ---------- $

Decree rendered June 3d, A. D. 1864. R't'n day, Jan'y 19, '65. Libellant's proctor.

(2.) Also endorsed: 1865, Feb'y 15th. Sold as within comm'd for $3,150.00; am't p'd, $800.00, marshal's fees, &c.

Com's on sale	72 00
Expenses	18 00
	$90 00

Due by Wm. Webster, $2,350. No deed given. Fees and expenses retained. Balance, $710. Paid clerk. John Underwood, U. S. M. W. A. Duncan, deputy.

Joseph B. Alexander, of the county of Washington, in the District of Columbia, and John J. Bowen, of the city of Rochester and State of New York, do on oath say that they are the owners of all that piece or parcel of land, with the house and buildings thereon, situate in Elizabeth City county, in the State of Virginia, being that farm and appurtenances which were seized and confiscated in the United States district court for the — district of Virginia, at Norfolk, as the property of Parker West; that they hold the deed of the United States marshal, John Underwood, bearing date 15th
50 February, 1865, and recorded with deeds of Elizabeth City county aforesaid, 11th April, 1867, for the same; that they have paid in full therefor and are unable to obtain possession of said property. Therefore they pray that your honor will be pleased to issue an order to the said marshal or his deputy, directing and commanding him to put them in immediate possession of said property.

J. B. ALEXANDER.
JOHN J. BOWEN.

Sworn and subscribed to before me, in open court, this 3d day of June, A. D. 1867.

W. H. BARRY,
Clerk U. S. District Court, — Dist. Va.

Endorsed: Ordered that writ of possession issue in this — to the marshal on payment of $2 to the clerk and $8 to the marshal. J. C. Underwood, dist. judge. Filed June 3, 1867. W. H. Barry, cl'k, by J. P. Hodges, dep.

At a regular term of the district court of the United States of America for the — district of Virginia, held at the court — in the custom-house, in the city of Norfolk, on the 30th day of May, in the year of our Lord one thousand eight hundred and sixty-seven.

Present: The Honorable John C. Underwood, district judge.

UNITED STATES
vs.
ALL THE RIGHT, TITLE, INTEREST, AND ESTATE OF PARKER West in and to All that Piece or Parcel of Land, with the House and Buildings Thereon, Situate, Lying, and Being in Elizabeth City County, Eastern District of Virginia, Bounded on the North by the County Road, on the East by Newport's News Creek and Parish, on the South by James River, and on the West by the Land of James Burke, together with All the Goods, Chattels, and Personal Property of the said Parker West in and upon the said Premises. } No. 94.

On reading and filing the affidavits of Joseph B. Alexander
51 and John J. Bowen, purchasers and owners of the property described in the above-entitled suit, and, on motion of L. H. Chandler, United States district attorney, for and in behalf of the owners and petitioners, it is ordered by the court that the marshal of this court put the said Joseph B. Alexander and John J. Bowen in possession of the premises above described.

Witness the Honorable John C. Underwood, judge of the United States district court for the — district of Virginia, at Norfolk, this third day of June, A. D. 1867.

WM. H. BARRY, *Clerk*,
By P. HODGES, *Dep.*

Endorsed (1): Norfolk, Va., June 4th, 1867. Executed, as within commanded, by putting the within-named persons in possession of the property, &c. John Underwood, United States marshal, per James N. Croft, dep't-.

Also endorsed (2): United States district court, — district of Virginia. United States *vs.* Parker West. Writ of possession. Filed June 6, 1867. W. H. Barry, cl'k, by J. P. Hodges. dep.

UNITED STATES OF AMERICA, *To wit:*

The President of the United States to the judge of the district court *for* the United States for the — district of Virginia, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said court, before you, between Parker West, plaintiff in error, and the United States, defendant in error, a manifest error hath happened, to the great damage of the said Parker West, as by complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of the United
52 States for the — district of Virginia, together with this writ, so that you may have the same at the city of Richmond, in the

said district, on the fourth Monday of November next, in the said circuit court to be then and there held, that, the record and proceedings aforesaid being inspected, the said circuit court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 19th day of May, in the year of our Lord one thousand eight hundred and sixty-eight.

W. H. BARRY,
Clerk of the Circuit Court of the United States
for the — District of Virginia.

Endorsed: No. —. United States circuit court, — *of* district of Virginia. Parker West, pl'ff in error, *vs.* The United States, def't in error. Writ of error to district court U. S., — dist. Va. Filed July 31, 1868. James P. Hodges, clerk.

District Court of the United States of America, — District of Virginia.

PARKER WEST, Pl'ff in Error,

vs.

THE UNITED STATES, Def't in Error.

Know all men by these presents that we, Parker West —— ——, are held and firmly bound unto the United States in the sum of five hundred dollars ($500.00), to be paid to the said United States; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 19th day of May, A. D. 1868.

Whereas the above-named Parker West hath prosecuted a writ of error to the circuit court of the United States for the — district of Virginia to reverse the judgment and decree rendered in the above-entitled suit by the district court of the United States for the — district of Virginia:

Now, therefore, the condition of this obligation is such that if the above-named Parker West shall prosecute his said writ of error to effect and answer all damages and costs if he shall
53 fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

his
PARKER x WEST. [SEAL.]
mark.
GEO. B. WEST.

Sealed and delivered in presence of—
J. P. HODGES, *Clerk.*

Endorsed: No. —. United States district court, — district of Virginia. Parker West, pl'ff in error, *vs.* The United States, def't in error. Bond. Filed July 31, 1868. J. P. Hodges, clerk.

I, Chas. T. Barry, clerk of the district court of the United States for the eastern district of Virginia, do hereby certify the foregoing to be a true and complete copy of the original papers *in re* The United States *vs.* Parker West, No. 94, confiscation, now on file in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Norfolk, in said district, this 5th day of December, 1885.

CHAS. T. BARRY, *Clerk.*

United States Circuit Court, Eastern District of Virginia.

RICHMOND, *October* 7, 1873.

PARKER WEST
vs.
THE UNITED STATES. } No. 10.

Appeal *for* district — in confiscation.

SAME
vs.
SAME. } No. 11.

Appeal from district court in confiscation.

On motion of the United States, by the district attorney, in the two above-entitled causes, it is ordered that said two causes be stricken from the docket.

54 UNITED STATES OF AMERICA,
Eastern District of Virginia, } *ss:*

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, hereby certify that the above is a true copy of the final order entered in the causes named.

Witness my hand and the seal of said court this 8th day of October, 1885, at Richmond, in said district.

[Circuit Court Seal.]

M. F. PLEASANTS, *Clerk.*

Fee, $100.

EXHIBIT "B."

(For plat see MS. record.)

EXHIBIT "C."

W. P. Marrow *et als.* to C. P. Huntington. Deed. D. B. 7, p. 195.

This indenture, made this, the sixth day of December, in the year of our Lord one thousand eight hundred and eighty, by and between William P. Marrow and Mary E., his wife, of the city of Richmond; Elizabeth R. West, George B. West, of the county of Elizabeth City, and M. Smith, of the county of King William, and Missouri P. Smith, his wife, of the county of Elizabeth City, all of the State of Virginia—the said Mary E Marrow, Elizabeth R. West, George B. West, and Missouri P. Smith, being the children and the heirs-at-law of Parker West, deceased—parties of the first part, and Collis P. Huntington, of the city, county, and State of New York, party of the second part, witnesseth:

That the said William P. Marrow and Mary E., his wife; Elizabeth R. West, Geo. B. West, and M. Smith and Missouri P., his wife, for and in consideration of the sum of eight thousand dollars, good and lawful money of the United States, to them paid by the said Collis P. Huntington at or before the ensealing and delivery of these presents, the receipt whereof they do hereby acknowledge and thereof acquit and forever discharge the said Collis P. Huntington, his heirs, executors, and administrators, by these presents have granted, bargained, sold, conveyed, aliened, enfeoffed, released, and confirmed, and by these presents do grant, bargain, sell, convey, alien, enfeoff, release, and confirm, unto the said Collis P. Huntington and unto his heirs and assigns forever all that certain tract, piece, or parcel of land situate, lying, and being in Southfield magisterial district, in the county of Elizabeth City and State of Virginia, known as the "Newport News farm," lately owned by Parker West, deceased, and as surveyed by William Ivy, surveyor, containing two hundred and thirty-seven (237) acres, more or less (excepting such lots and parcels thereof as are hereinafter specifically excepted from the operation of this instrument), which said farm or tract of land is bounded and described as follows, to wit: On the northwest and north by the lands formerly owned by Burke (now in controversy), on the northeast and east by lands now owned by the heirs of the said Parker West, deceased, known as Pumpkin Hall, and by the lands formerly owned by S. M. Bowman, known as the "Ivy tract," and by Newport News creek; on the southwest by the James river and fronting on said river, excepting, first, ten acres (undivided) in that certain lot known as lot No. 1, containing fifteen acres, according to Ivy's survey of the Newport News farm, and now owned by George B. West, excepting, thirdly, five acres (undivided) in said lot No. 2, now owned by C. F. Groome, excepting, fourthly, three acres (undivided) in lot No. 4 (Ivy's plat

55

of survey), now owned by William H. Kimberly, excepting, fifthly, one-half an acre (undivided) in lot No. 6 (Ivy's plat of survey) owned by John B. Whitehead, the portions hereby excepted from the operation of this instrument containing in the aggregate thirty-eight acres and one-half an acre, together with all the estate, right, title, interest, and property, as well in possession as in expectancy, claim, and demand whatsover of them and each of them, the said William P. Marrow and Mary E., his wife, Elizabeth R. West, George B. West, and M. Smith and Missouri P., his wife, in law and equity or otherwise however, of, in, to, and out of the said land herein conveyed; to have and to hold the said tract, piece, or parcel of land herein conveyed and every part and parcel thereof unto the said Collis P. Huntington, his heirs and assigns, forever, *and unto the only forever*, and unto the only proper use and behalf of him, the said Collis P. Huntington, his heirs and assigns, forever.

And the said William P. Marrow and Mary E., his wife, Elizabeth R. West, George B. West, and M. Smith and Missouri P., his wife, the said tract, piece, or parcel of land and every part and parcel thereof herein conveyed unto the said Collis P. Huntington, his heirs and assigns, will forever warrant and defend against themselves and each of them, and their heirs and the heirs of each of them, and all persons whatsoever claiming or to claim by, through, or under them.

56 In witness whereof we have hereunto affixed our signatures and seals the day and year first above written.

WILLIAM P. MARROW.	[SEAL.]
MAY E. MARROW.	[SEAL.]
E. R. WEST.	[SEAL.]
GEO. B. WEST.	[SEAL.]
——— ———.	[SEAL.]
MISSOURI P. SMITH.	[SEAL.]

MEMORANDUM.—The words "excepting, secondly, — acres (undivided) in lot No. 2 (Ivy's plat of survey), owned by George B. West," on page 2, lines numbered 26, 27, 28, and 29, were erased from this deed before the said deed was signed or sealed by any of the parties thereto.

Witness the following signatures and seals:

WILLIAM P. MARROW.	[SEAL.]
MARY E. MARROW.	[SEAL.]
E. R. WEST.	[SEAL.]
GEO. B. WEST.	[SEAL.]
——— ———.	[SEAL.]
MISSOURI P. SMITH.	[SEAL.]

(Pages 73, 74, 75, 76, and 77 of MS. record omitted.)

In the clerk's office of the county court of Elizabeth City county January 31st, A. D. 1881, 5.30 o'clock p. m., this deed was presented and upon certificates annexed admitted to record as the law directs.

Teste: S. E. BICKFORD, *Clerk.*

A copy.

Teste: S. E. BICKFORD, *Clerk.*

57 & 58 EXHIBIT

Please examine and

DR. Brinkley and Whiting *vs.* Latimer and West, and Willis in account

1879.					
Ap'l	14.	To c'k		288 66	
		"		91 85	
					380 51
	22.	"			50 00
May	8.	"		199 56	
		"		184 00	
					383 56
	9.	"			23 39
	13.	"			15 00
	15.	"			11 50
	22.	"			53 94
		"			67 12
	29.	"			37 20
July	11.	"			1,077 36
1880.					
M'ch	2.	"			121 80
Ap'l	8.	"			227 00
May	3.	"			62 49
	15.	"			182 96
July	13.	"			460 00
	27.	"		102 86	
		"		236 50	
					339 36
1881.					
Ap'l	6.	"			159 66

60	Balance	6,241 75
		$9,894 60

" D." 59

report immediately.

and Wife *vs.* Latimer, and Peek *vs.* West, &c.,
current with the Marine Bank of Norfolk, Va. CR.

1879.			
Feb. 25.	By cash		221 87
M'ch 21.	" "		339 22
	" "		272 00
Ap'l 5.	" "		404 70
7.	" "		88 05
23.	" "		642 14
25.	" "		342 39
26.	" "		405 89
May 9.	" "		295 12
Aug. 14.	" "		50 00
Dec. 10.	" "		1,239 25
23.	" "		138 00
1880.			
Jan. 1.	" interest		30 00
2.	" cash		138 25
M'ch 8.	" "		694 13
20.	" "		1,030 00
Ap'l 19.	" "		144 14
July 1.	" int.		82 96
Dec. 10.	" cash		1,059 78
14.	" "		545 59
1881.			
Jan. 1.	" int.		93 00
May 27.	" cash		532 50
July 1.	" int.		119 60
1882.			
Jan 1.	" "		123 22
July 1.	" "		123 22
1883.			
Jan. 1.	" "		123 27
July 1.	" "		123 27
1884.			
Jan. 1.	" "		123 27
July 1.	" "		123 27
1885.			
Jan. 1.	By int.		123 25
61 July 1.	" "		123 25
			$9,894 60

1885.		
July 1.	By balance	$6,241 75

EXHIBIT

Please examine and

DR. Suit—Brinkley, Whiting, *et als. vs.* Latimer, West, *et als.*, in account

1871.			
Nov.	28.	To cash	53 59
		T. Tabb	53 59
		G. M. Peek	53 60
1872.			
May	4.	Wm. Ivy	45 00
	13.	G. M. Peek	329 67
	17.	Thos. Tabb	169 66
June	5.	C. K. Mallory	109 67
Oct.	15.	G. M. Peek, for T. Tabb	18 33
		" for D. G. Marrow	18 33
		" for M. McDevitt	254 71
		C. K. Mallory, att'y for Brink	500 00
		"	18 33
1873.			
Jan.	21.	C. K. Mallory, att'y for M. L. Lake	1,212 38
		" " J. W. Whitehurst	683 32
		" " Brinkley	280 50
Ap'l	21.	" " E. D. King	355 30
	25.	T. Tabb, att'y L. Garrow, adm'x	272 51
		" " Virg'a Cooper	187 48
		" " J. Wray, adm.	136 08
		C. K. M., att'y for J. W. Whitehurst	406 04
		" "	752 61
	26.	W. S. Howard	250 00
May	15.	E. W. Holt, D. C.	7 77
	23.	D. G. Marrow	50 00
Aug.	27.	W. S. Howard	665 00
1884.			
Feb.	10.	C. K. M., att'y for G. West	839 93
	13.	W. S. Howard, att'y T. M. Joynes	415 64
62 Ap'l	7.	J. E. Mastead, per. rep. Wm. Lee	134 79
		" " "	144 89
		T. Tabb, ass'n C. K. Mallory	177 00
		T. E. Mastead, per. rep. Wm. Lee	854 40
		G. M. Peek, att'y Wm. Wood	593 33
		" com'r	19 20
Ap'l	29.	E. W. Holt, cl'k	3 05
	27.	Farmers' Bank of Va.	1,076 02
May	26.	C. K. Mallory	123 50
Nov.	12.	G. M. Peek	29 00
1875.			
Feb.	2.	W. R. Willis	82 97
		T. Taylor, for F. Sav. Ins.	751 03

" E."

report within ten days.

Willis *et ux. vs.* Latimer *et als.*, and Peek *vs.* West and West, current with the Citizens' Bank of Norfolk, Va.

				Cr.
1872.				
Jan.	8.	By cash		200 00
	28.	" "		500 00
Ap'l	26.	" "		120 00
		" "		60 00
May	1.	" "		288 35
June	27.	" "		150 00
July	15.	" "		23 50
Oct.	11.	" "		301 00
1873.				
Jan.	1.	" interest		8 75
	8.	" cash		1,464 37
	20.	" "		520 71
	22.	" "		164 50
M'ch	13.	" "		126 50
	18.	" "		380 47
		" "		126 81
	31.	" "		604 20
Ap'l	3.	" "		302 10
	14.	" "		352 45
	18.	" "		503 50
July	2.	" "		102 00
	10.	" "		51 00
	12.	" "		26 50
Aug.	13.	" "		507 06
Nov.	21.	" "		300 00
1874.				
Feb.	9.	" "		1,068 79
M'ch	3.	" "		772 50
		" "		772 50
	17.	" "		133 59
63	M'ch	20. By cash		401 98
	Ap'l	9. " "		372 40
Ap'l	16.	By cash		638 40
June	26.	" "		319 20
Dec.	3.	" "		28 60
1875.				
Jan.	1.	" interest		9 20
Ap'l	4.	" cash		823 85
		" "		825 00
July	1.	" interest		8 10
Aug.	27.	" cash		29 45
Oct.	19.	" "		1,133 66
	25.	" "		1,280 42

1875.			
May	29.	T. Tabb, for T. Watts, Sr.	55 20
		J. D. Gordon & Co.	416 32
	27.	A. C. Tabb, ass'n M. B. Smith	50 00
		" " "	950 00
Sep.	20.	G. M. Peek	8 00
	17.	T. Tabb, att'y W. P. Marrow	90 83
Nov.	13.	L. Garrow, adm'x	43 21
	13.	T. Tabb, att'y G. W. Camp	416 24
	13.	" " Massenburg & Co.	669 39
		G. M. Peek, att'y Peek & Sons	162 30
	9.	S. Smith, att'y M. B. Smith	93 98
	8.	" " "	289 16
Dec.	15.	T. Tabb, att'y W. H. Curtis	181 30
		" " Wm. Lee's per. rep.	317 59
		" " W. H. Curtis	389 81
		G. M. Peek, Wm. Anderson	854 56
Nov.	8.	L. Garrow, adm'x	176 12
		Balance	2,128 66
			$19,420 89

1875.				
Nov.	10.	By cash		437 99
	30.	" "		336 30
Dec.	3.	" "		404 45
	13.	" "		100 00
	18.	" "		40 00
1877.				
Jan.	13.	" "		176 12
1878.				
Dec.	20.	" "		58 83
1879.				
Ap'l	23.	" "		629 16
July	1.	" interest		1 50
Nov.	25.	" cash		905 73
1885.				
July	1.	" interest to date		529 40
				$19,420 89
1885.				
July	1.	By balance		$2,128 66

64 (Pages 81 and 82 of MS. record omitted.)

Demurrer and Answer of John B. Whitehead.

VIRGINIA:

In the Circuit Court of Warwick County, to wit: In Chancery.

WILLIAM P. MARROW and MARY E., His Wife; GEORGE B. WEST, and MISSOURI SMITH, Plaintiffs,

vs.

JOSEPH B. BRINKLEY, JOHN L. PEEK, JOHN B. WHITEHEAD, A. P. Thom, Trustee; William H. Kimberly, Martin McDevitt, Charles F. Groome and Emma D., His Wife; George M. Schermerhorn, and George Booker, Defendants.

Demurrer.

The said defendant, John B. Whitehead, says that the bill of complaint in this cause is not sufficient in law.

TUNSTALL & THOM, *P. D.*

Answer.

The separate answer of John B. Whitehead to a bill of complaint exhibited against him and others in the circuit court of the county of Warwick by William P. Marrow and Mary E., his wife; *John* B. West, and Missouri Smith.

This respondent, answering, without waiving his demurrer filed in this cause, and reserving to himself the benefit of all just exceptions to the said —, for answer thereto, or so much thereof as he is advised it is material that he should answer, answers and says—

First. That he admits the original title of Parker West as set forth in the first paragraph of said bill to the property mentioned, and that he occupied and held possession of the same as therein alleged.

That he further admits the institution of the confiscation proceedings as mentioned in the first paragraph of the bill, but prays reference to Exhibit "A" filed with said bill for the particulars, construction, and effect of the same.

65 Second. This respondent admits the institution of the proceedings in the circuit court of Elizabeth City county as alleged in said bill, but prays reference to a certified copy thereof, filed with the answer of Alfred P. Thom, trustee, in this cause, for the particulars, construction, and effect thereof, and makes the said record or certified copy thereof a part of this his answer.

Third. This respondent also admits proceedings in said causes of the nature alleged in the third paragraph of said bill, but repeats his prayer for reference to the record of said proceedings, herewith filed, for the particulars, construction, and effect thereof.

Fourth. This respondent likewise admits the rendition of the decree of May 4th, 1871, but avers that the land itself and the fee-simple interest in the same and no less estate was sold in said proceed-

ings, and the court so intended and divested, as clearly appears from the record thereof.

Fifth. This respondent, further answering, alleges that the construction and effect of said confiscation proceedings is a matter of law and has been determined by the court in a proceeding *inter* parties and is *res adjudicata*, and it is not a matter of fact to which any answer is required, but this respondent pleads that the rights of the creditors of Parker West could in nowise be affected by the confiscation proceedings, the purpose and object thereof being to deprive Parker West personally of the enjoyment and use of the confiscated property and could not be and were not intended in any way to affect the rights of his creditors existing prior to such proceedings, and that if this respondent's construction of the effect of said confiscation proceedings above given should be erroneous that he futher pleads that the heirs of Parker West took upon his death as heirs and subject to the rights of his creditors; and this respondent further says that said circuit court of Elizabeth City county is and was at the time of the proceedings mentioned in paragraph two of this answer a court of general and not limited jurisdiction, and at the time of the said proceedings the property in controversy in this cause was situated in Elizabeth City county and within the territorial jurisdiction both of the subject-matter *and* of the said causes and of the parties thereto.

This respondent does not admit, but, on the contrary, positively denies, that the decree of May 4th, 1871, above referred to, is absolutely null and void, as charged in said bill, or that at its
66 date the heirs of Parker West were necessary parties to the said suit prior to the death of Parker West, at which time they duly and properly became parties to said suit, as will hereinafter appear; and this respondent denies that the sales of the deeds mentioned in said fifth paragraph were null and void, but, on the contrary, affirms that the same are in every respect valid and binding.

Sixth. This respondent admits that the special commissioners mentioned in the sixth paragraph of said bill made reports of land sold by them as therein alleged, the report of the land reported as sold to this respondent and John S. Tucker being made at the October term, 1872. He further admits that Parker West died intestate in December, 1871, and he is informed and believes that George B. West, Elizabeth R. West, Missouri Smith, and Mary E. Marrow were his only children and heirs-at-law; he is also informed and believes that Elizabeth R. West died in the year 1885, intestate, unmarried, and without issue.

It is impossible for this respondent to say what were the secret doubts or determinations entertained by the heirs of Parker West as to their rights and actions in the premises, but he is informed and believes that they were all thoroughly cognizant of the fact that there were proceedings pending in the said court to sell said lands, and under those proceedings the lands mentioned in the bill were sold, and that they had this knowledge at the time of the proceedings mentioned.

He is further informed and believes that by a writing signed by

them on April 17th, 1872, they claimed an interest in the proceeds of the sale of said lands and property, recognized the pendency and validity of said proceedings and the sales of the land made therein, and conveyed their interest in such proceeds to Thomas Tabb, trustee, to secure an indebtedness due by them.

He further alleges, on information and belief, that ever since, and even before the making of said writing, the said parties have been and were cognizant, first of the object and purpose of said proceedings, and afterwards of the conviction entertained and the claim asserted by the purchasers of the said property of their perfect title to the same.

A copy of the said deed of trust of April 17th, 1872, is filed as an exhibit with the answer of Chas. F. Groome and wife in this cause, and the same is hereby specially referred to and made a part of this answer.

And this respondent believes that the said heirs of Parker West have lost their rights in the confiscated lands if, since the period referred to, they had any, which this respondent denies.

67 This respondent does not know when the parties learned of the decision of the Supreme Court of the United States in the case of Wallach *vs.* Van Riswick, but if, as they allege, they learned of it in 1876 it appears that they have known even of that decision for a period of nearly ten years before the institution of this suit.

And this respondent is advised that the said decision is in no way in conflict with the action of the said circuit court of Elizabeth City county or with the rulings of the said court since then upon the same subject.

The said bill is calculated to make an erroneous impression as to the action of C. P. Huntington as to the purchase of the property bought by him at Newport News, although this respondent does not recognize the relevancy or importance of the allegations of said bill in reference to Mr. Huntington's action.

He is informed and believes that Mr. Huntington never recognized or admitted in any way that the said plaintiffs had any good title or valid rights in the land referred to, but that, as he intended to make Newport News the deep-water terminus of the Chesapeake and Ohio railroad and as the plaintiffs were asserting a claim against the property which he had formerly purchased from others, he deemed it to his advantage to purchase the claims of the said plaintiffs rather than have the delay, expense, and vexation of litigation with them; that if he had recognized or if the plaintiffs had thought that their title to the said property was good they would never have consented to sell the same for the mere pittance of eight thousand dollars which they accepted from him.

Seventh. This respondent admits that on the 4th day of May, 1872, the first term of the circuit court of Elizabeth City county after the death of Parker West, a decree was entered in the said consolidated causes, beginning as alleged in the said bill.

This respondent has no personal knowledge as to the truth of the recitals of that decree. He alleges that he is a purchaser for value of so much of the land as is in controversy in this suit, as herein-

after appears, and without notice of any pretensions or claims whatever of adverse ownership on the part of the plaintiffs or any of them; that on or about the 26th day of March, 1880, said property was conveyed to this respondent, as directed by the decree in said suit; that prior thereto he had paid the full purchase price of said property, and never had any notice or suspicions of such pretensions or claims of said plaintiffs until long subsequent to said deed to this respondent.

That the decree ordering the sale in said causes was entered more than six months before this respondent purchased said land,
68 and said sale was duly confirmed; that he purchased upon full faith of and confidence in the truth of the recitals in said record and in absolute ignorance of any adverse claims on the part of the plaintiffs or any of them, and he never heard the least intimation or question about the truth of said recitals of said decree or that the said plaintiffs were not in fact parties to said proceedings, and he is advised that it was in no way incumbent upon him to look beyond the recitals of said decree and the face of said proceedings, and he had a right to rely absolutely upon the said decree and the truth and accuracy of all of said recitals.

And this respondent is further advised that, being as aforesaid a purchaser for value of said property and without any notice of any infirmity in the proceedings in said causes or any want of verity in the findings of said decree of May 4th, 1872, he is now, and at all times since the said purchase was confirmed by the court, absolutely protected by the said record, and no assault can be made thereon by any person who appears upon said record to have been a party thereto which will affect his interest as such purchaser or those claiming under him.

This respondent further says that even if the pretensions now set up by the plaintiffs are well founded in fact, which this respondent denies, that, as above stated, he is informed and believes, and thereupon alleges, that they were cognizant of the fact that the proceedings were pending under which he (this respondent) purchased, and that the object thereof was to sell the property in question; that they stood by in silence and saw this respondent purchase without a word of warning or any indication of a hostile claim on their part.

That, on the contrary, as early as April, 1872, they asserted their claim to and conveyed their interest in the proceeds of sale of said property as security for a debt which they desired to secure; that this respondent would not have purchased had he known of the claim now asserted by the plaintiffs; that circumstances and the situation of the parties have greatly changed in the intervening period, and that this respondent had arranged, ordered, and disposed his estate in perfect confidence in the validity of his title to the said property, and has conveyed the same to Alfred P. Thom, trustee, for the purposes shown in the deed of trust filed with the answer of said trustee.

That Chas. K. Mallory, the attorney who appeared for and represented the heirs of Parker West in said proceedings (said heirs be-

ing now plaintiffs in this suit), but whose employment and authority they now deny, has since died, and the materials for the in-
69 vestigation asked by the plaintiffs are not now in existence, and no such investigation can now be had with due regard for the rights of the purchasers, who were never in a position to be personally cognizant of the facts and relied with implicit confidence upon the solemn assurance of the court in its record that the said heirs of Parker West had come in and, upon their own motion, been admitted as parties defendant to the proceedings.

And this respondent further says that the plaintiffs having slept upon their rights for a period of fourteen years are now, by their laches, estopped from setting up their claim even if under other circumstances they would have had any, which this respondent denies.

This respondent further alleges, on information and belief, that the said Charles K. Mallory did represent said plaintiffs at the time of the rendition of said decree of May 4, 1872, appearing for them and making them parties to the said consolidated causes, and continued thereafter to represent them in said causes until his death, which occurred in June, 1875, and he denies all the allegations in said bill contrary thereto.

Eighth. This respondent, disclaiming any personal knowledge as to the truth of the recitals of said decree of May 4th, 1872, states, upon information and belief, that Mr. Charles K. Mallory, now deceased, but at that time an attorney practicing in the circuit court of Elizabeth City county and a man of the highest integrity and honor, appeared for and represented the plaintiffs in these causes at the time of the rendition of the decree of May 4th, 1872, and continuously thereafter until his death, and that he would have scorned to do anything that would have been an injustice to the plaintiffs or anybody else, or to have made any false or fraudulent representations to the court, all of which the plaintiffs well knew, notwithstanding their denials in said bill that the parties representing them were known to them, the said plaintiffs.

This respondent further denies that the said decree was a fraud upon the plaintiffs or the court, or that he is asking the court to perpetuate a fraud, but claims that he is relying upon the sanctity and verity of the solemn acts of a court of general jurisdiction, which to him speak absolute truth, upon the faith of which he acquired his rights, and that it would now be a fraud upon this respondent and those claiming under him to allow these plaintiffs, after quietly resting in silence during this long period, to come in and assert any right antagonistic to the unimpeachable verity of the said proceedings.

Ninth. This respondent is advised that the proceedings
70 mentioned in the ninth paragraph of said bill would have been necessary only in the case of a proceeding emanating from the plaintiffs in the said consolidated causes to make the heirs of Parker West parties to the same, and that the necessity for all such proceedings was obviated by the voluntary appearance and motion of said heirs, on which they were made parties defendant to the said causes. In this connection this respondent calls the atten-

tion of the court to the fact George B. West, one of the plaintiffs in this cause, who is as emphatic in his allegation contained in said bill as are the others, purchased certain property under the decrees in the said consolidated causes, accepted deeds from the said special commissioners therein, and still continues to hold the same.

Tenth. In response to the tenth paragraph of said bill in reference to the report of the 23d day of April, 1880, of George M. Peek, special commissioner, this respondent says that it appears from the allegations of the plaintiffs in said paragraph itself that the checks in question were drawn by the said George M. Peek in favor of those parties, as alleged in said report, and were delivered to the said George B. West, notwithstanding the said plaintiffs also deny that the said facts are true.

Whether the said parties refused to accept theirs from the said George B. West or whether they were lost by him this respondent does not know. It is certain at least and established by the allegations of the plaintiffs themselves in said bill that the said George B. West, who is now a party plaintiff to this suit, accepted his own as well as other checks from said special commissioner without objection.

It is likewise true that from the very inception of said consolidated causes the said George B. West was a party defendant therein in a fiduciary capacity, and that in his individual capacity he purchased a portion of said Newport's News land under decrees in said causes.

Eleventh. This respondent admits that in the year 1885 plaintiffs and Elizabeth R. West and others instituted an action of ejectment against him and others, as alleged in the eleventh paragraph of said bill, and that after a hearing in the same the said plaintiffs submitted to a nonsuit. He further admits that the court ruled that no evidence could be heard to impeach the recitals of the decree of May 4th, 1872, in any collateral suit, not even deeming it necessary to pass upon the objection raised by the defendants therein to the competency of the said plaintiffs as witnesses, but he denies that the court held that the plaintiffs in this suit had appeared in open
71 court in proper person, if it be intended so to state in said bill, or that the court ruled that the said decree so alleged.

And he further denies that the counsel for the defence in said action based their defence on any such claim. Such a construction of said decree may have been mentioned in argument, as was likewise, as this respondent is informed, the fact that the said Charles K. Mallory represented the heirs of Parker West.

Twelfth. This respondent is advised that it is unnecessary for him to answer the allegations in the 12th paragraph of said bill, except so far as he has done so in the preceding parts of this answer, to which reference is hereby made.

Thirteenth. This respondent alleges that he conveyed to Alfred P. Thom, trustee, an undivided one-half interest in the twenty and one-half acres of lot No. 8, and not the whole interest, as alleged in said bill. In addition thereto he assigned to the said Alfred P. Thom, trustee, a certain debt which is a lien upon the remaining

undivided one-half interest, as will appear from a deed bearing date December 4th, 1885, from this respondent to John S. Tucker, a copy of which is filed as Exhibit "A A" with the answer of John S. Tucker in this cause, to which reference is hereby made.

Some of the allegations and denials of this answer, referring in terms only to the plaintiffs, this respondent here repeats all such allegations and denials, and includes therein Elizabeth R. West, who is now dead, so far as they refer to the conduct and knowledge of the plaintiff in and about the proceedings in said consolidated causes or thereafter up to the death of said Elizabeth R. West.

Fourteenth. The plaintiffs, prior to the institution of the said action of ejectment, may have indicated their willingness to refund the full amount of the purchase-money paid to the said special commissioners, with interest from the time of payment, but this respondent attached no importance thereto, as he now claims, and has always since he purchased the said land, as above mentioned, that he or those claiming under him is entitled to and owns a fee-simple interest in said land; and he further says that if the said plaintiffs have refused to take money on deposit to the credit of said consolidated causes, or so much thereof as they may be entitled to receive, they have done so of their own wrong, and this respondent is not concerned in any such refusal on their part; and now, having fully answered, this respondent prays to be hence dismissed with his reasonable costs.

And as in duty bound he will ever pray.

JNO. B. WHITEHEAD.

THOMAS TABB,
TUNSTALL & THOM, *P. D.*

72 *Demurrer and Answer of A. P. Thom, Trustee.*

VIRGINIA:

In the Circuit Court of the County or Warwick. In Equity.

WM. P. MARROW and MARY E., His Wife; GEO. B. WEST, and MISSOURI SMITH, Compl'nts,

vs.

JOS. B. BRINKLEY, JOHN L. PEEK, JOHN B. WHITEHEAD, ALFRED P. Thom, Trustee; William H. Kimberly, Martin McDevitt, Charles F. Groome and Emma D., His Wife; George M. Schermerhorn, and George Booker, Defendants.

Demurrer,

The said defendant, Alfred P. Thom, trustee, says that the bill of complaint in this cause is not sufficient in law.

THOMAS TABB,
TUNSTALL & THOM, *P. D.*

Answer.

VIRGINIA:

In the Circuit Court of the County of Warwick, to wit:

WM. MARROW and MARY E., His Wife; GEO. B. WEST, and MISSOURI SMITH, Plaintiffs,

vs.

JOS. B. BRINKLEY, JNO. L. PEEK, JOHN B. WHITEHEAD, ALFRED P. Thom, Trustee; Wm. H. Kimberly, Martin McDevitt, Chas. F. Groome and Emma D., His Wife; George W. Schermerhorn, and Geo. Booker, Defendants.

The separate answer of Alfred P. Thom, trustee, to a bill of complaint exhibited against him and others in the circuit court of the county of Warwick by Wm. P. Marrow and Mary E., his wife, Geo. B. West, and Missouri Smith.

This respondent, answering, without waiving his demurrer filed in this cause, and reserving to himself the benefit of all the
73 just exceptions to the said bill, for answer thereto, or to so much thereof as he is advised it is material that he should answer, answers and says:

First. He admits the original title of Parker West as set forth in the first paragraph of said bill to the property therein mentioned, and that he occupied and held possession of the same as therein alleged; that he further admits the institution of the confiscation proceedings as mentioned in said first paragraph of the bill, but prays reference to Exhibit "A," filed with said bill, for the particulars, construction, and effect of the same.

Paragraph 2. This respondent admits the institution of the proceedings in the circuit court of the county of Elizabeth City, as alleged in said bill, but prays reference to a certified copy thereof, filed with this answer, for the particulars, construction, and effect thereof.

Paragraph 3. This respondent admits proceedings in said causes of the nature alleged in the third paragraph of said bill, but here repeats his prayer for reference to the record of said proceedings herewith filed for the particulars, construction, and effect thereof.

Paragraph 4. This respondent likewise admits the rendition of the decree of May 4th, 1871, but he avers that the land itself and the fee-simple interest in the same and no less estate was sold in said proceedings and the court so intended and directed, as clearly appears from the record thereof.

Paragraph 5. That this respondent alleges that the construction and effect of said confiscation proceedings is a matter to be determined by the court and is not a matter of fact to which any answer is required; but this respondent pleads that the rights of the creditors of Parker West could in nowise be affected by the confiscation proceedings, the purpose and object thereof being only to deprive Parker West personally of the enjoyment and use of the confiscated

property, and could not and were not intended in any way to affect the rights of his creditors existing prior to such proceedings, and that if this respondent's construction of the effect of said confiscation proceedings as above given should be erroneous that he further pleads that the heirs of Parker West took upon his death, as heirs, and subject to the rights of his creditors; that this respondent further says that the said circuit court of Elizabeth City county is a court of general and not limited jurisdiction, and at the time
74 of the proceedings in this paragraph mentioned that the property in controversy was situated in Elizabeth City county and within the territorial jurisdiction of the said circuit court, and that the said court had jurisdiction of the subject-matter.

This respondent does not admit, but, upon the contrary, positively denies, that the decree of May 4th, 1871, is absolutely null and void as charged in said bill, nor that at its date the heirs of Parker West were necessary parties to said suit, as will hereinafter appear; and this respondent denies that the sales or the deeds mentioned in said fifth paragraph are null and void.

Paragraph 6. This respondent admits that the special commissioners mentioned in the sixth paragraph of said bill made reports of land sold by them as therein alleged. He further admits that Parker West died intestate in December, 1871, and he is informed and believes that Geo. B. West, Elizabeth R. West, Missouri Smith, and Mary E. Marrow were his only children and heirs-at-law.

It is impossible for this respondent to say what were the secret doubts or determinations entertained by the heirs of Parker West as to their rights and actions in the premises, but he is informed and believes that they were all thoroughly cognizant of the fact that there were proceedings pending in said court to sell the said lands, and that under these proceedings the lands mentioned in the bill were sold, and that they had this knowledge at the time of the proceedings mentioned.

He is further informed and believes that by a writing signed by them in April or May, 1872, they claimed an interest in the proceeds of the sale of said lands and property, and conveyed such interest to Thomas Tabb, trustee, to secure an indebtedness. He further alleges, on information and belief, that ever since and even before the making of said writing the said parties have been cognizant, first, of the object and purpose of said proceedings, and, afterwards, of the conviction entertained and the claim asserted by the purchasers of the said property of their perfect title to the same; and this respondent believes that the said heirs of Parker West have lost their rights in the confiscated lands, if, since the period referred to, they have had any, which this respondent denies.

This respondent does not know when the said parties learned of the decision of the Supreme Court of the United States in the case of Wallach *vs.* Van Riswick, but if, as they allege, they learned of it in 1876 it appears that they have known even of that decision for a period of nearly ten years. This suit was instituted only in the year 1886.

The said bill is calculated to make an erroneous impression as

to the action of C. P. Huntington in reference to the pur-
75 chase of the property bought by him at Newport News, al-
though this respondent does not recognize the relevancy or importance of the allegations of said bill in reference to Mr. Huntington's action. He is informed and believes that Mr. Huntington never recognized or admitted in any way that the said plaintiffs had any good title or valid rights in the lands referred to, but that, as he intended to make Newport News the deep-water terminus of the Chesapeake and Ohio railway, and as the plaintiffs were asserting a claim against the property which he had previously purchased from others, he deemed it to his advantage to purchase the claims of the said plaintiffs rather than have the delay, expense, and vexation of litigation with them; that if he had recognized or if the plaintiffs had thought that their title to said property was good they would never have consented to sell the same for the mere pittance of eight thousand dollars which they accepted from him.

Paragraph 7. This respondent admits that on the 4th day of May, 1872, the first term of the circuit court of Elizabeth City county after the death of Parker West, a decree was entered in the said consolidated causes, beginning as alleged in said bill.

This respondent has no personal knowledge as to the truth or falsity of the recitals of that decree. He alleges that he is a purchaser for value of so much of the land in controversy in this suit as hereinafter appears and without notice of any pretensions or claim whatever of adverse ownership on the part of the plaintiffs or any of them; that he received a deed for the same from John B. Whitehead and Emily A., his wife, bearing date April 9th, 1885; that simultaneously with the delivery to him of such deed, which was on the said 9th day of April, 1885, he took possession of the property conveyed therein and accepted the trust and entered upon the discharge of his duties as trustee thereunder, and has ever since continued and is now continuing in the discharge of the same, and that he never heard of any such claims or pretensions on the part of the West heirs until long subsequent thereto. A copy of said deed is herewith filed, marked Exhibit "No. 1."

That he is not a purchaser from the special commissioners in said suit, but from John B. Whitehead, who was a purchaser from said special commissioners; that he files herewith a copy of the deed from John B. Whitehead and Emily A., his wife, bearing date April 9th, 1885, which conveys said property to him, and he alleges that as to him, whatever may be the actual fact in reference to the recitals of the record in said consolidated causes, that they speak
76 absolute and unassailable verity and cannot be questioned in any way to affect his title to the said property. He is further advised that the said John B. Whitehead, who was a purchaser from the special commissioners in said consolidated causes and purchased under decree in said causes more than six months after the date of said decree, as before stated, said sale being confirmed, purchased with full confidence in and upon the faith and credit of the truth of the recitals in said record, and that John B. Whitehead had never heard any question about the truth of said recitals of said decree or

any claim that the said plaintiffs were not in fact parties to said proceedings, and he is advised that it was in no way incumbent upon said John B. Whitehead to look beyond the recitals of said decree and the face of said proceedings, and that he had a right absolutely to rely upon the truth and accuracy of all such recitals.

And this respondent is further advised that the said John B. Whitehead, being as aforesaid a purchaser for value of said property and without any notice of any infirmity in the proceedings in said causes or any want of verity in the recitals and findings of said decree of May 4th, 1872, is now and at all times since his said purchase was confirmed by the court, absolutely protected by the said record, and no assault can be made thereon by any person who appears upon said record as to have *have* been a party thereto which will affect his interest as such purchaser or those claiming under him.

This respondent further says that even if the pretensions now set up are well founded in fact that, as above stated, he is informed, believes, and thereupon alleges that they were thoroughly cognizant of the fact that the proceedings were pending under which the said John B. Whitehead purchased, and that the object thereof was to sell the property in question; that they stood by in silence and saw the said John B. Whitehead purchase without a word of warning or any indication of a hostile claim on their part; that, on the contrary, as early as April, 1872, they asserted their claim to and conveyed their interest in the proceeds of sale of said property as security for a debt they desired to secure; that the said John B. Whitehead would not have purchased had he known of the claim now asserted by plaintiffs; that circumstances and the situation of the parties have greatly changed in the intervening period; that John B. Whitehead has managed, ordered, and disposed his estate in perfect confidence in the validity of his title to the said property, and has conveyed so much as is hereinafter mentioned to this respondent, who took the same with similar confidence; that Charles K. Mallory, the attorney who appeared for and represented the heirs of Parker West, who are now plaintiffs in this suit, in said proceedings,
77 but whose employment and authority they now deny, has since died, and the materials for the investigation asked by the plaintiffs are not now in existence and no such investigation can be had with due regard for the rights of the purchasers, who were never in a position to be personally cognizant of the facts and relied with implicit confidence upon the solemn assurance of the court in its record that the said heirs of Parker West had come in and, upon their own motion, been admitted as parties defendant to the proceedings.

And this respondent further says that the plaintiffs, having slept upon their rights for a period of fourteen years, are now, by their laches, estopped from setting up their claim even against the said John B. Whitehead and *a fortiori* against this respondent, who was a purchaser from the said John B. Whitehead for value and without notice of any claim set up by them.

This respondent further alleges, on information and belief, that the said Chas. K. Mallory did represent the said plaintiffs at the

time of the rendition of said decree of May 4th, 1872, appearing for them and making them parties to said consolidated causes, and continued thereafter to represent them in said causes until his death, which occurred in June, 1875, and he denies that the said Charles K. Mallory was not authorized or employed by the said plaintiffs so to represent them, and he denies all allegations in said bill contrary thereto.

Paragraph 8. This respondent, disclaiming any personal knowledge as to the truth of the recitals of said decree of May 4th, 1872, states, upon information and belief, that Mr. Charles K. Mallory, now dec'd, but at that time an attorney practicing in the circuit court of Elizabeth City county and a man of the highest integrity and honor, appeared for and represented the plaintiffs in these causes at the time of the rendition of the decree of May 4th, 1872, and continuously thereafter until his death, and that he would have scorned to do anything that would have been an injustice to the plaintiffs or anybody else or to have made any false or fraudulent representations to the court; all of which the plaintiffs well knew, notwithstanding their denials in said bill that the person representing them was unknown to them, the said plaintiffs.

This respondent further denies that the said decree was a fraud upon the plaintiffs or the court or that he is asking the court to perpetuate a fraud, but claims that he is relying upon the sanctity and verity of the acts of a court of general jurisdiction, which to him and those under whom he claims speak absolute truth, upon the faith of which he and they acquired the rights they now
78 have, and that it would now be a fraud upon this respondent to allow these plaintiffs, after quietly resting in silence for a period of 14 years, to come in and assert any right antagonistic to the unimpeachable verity of the said proceedings.

Paragraph 9. This respondent is advised that the proceedings mentioned in the ninth paragraph of said bill would have been necessary only in the case of a proceeding emanating from the plaintiffs in the said consolidate causes to make the heirs of Parker West parties to the same, and that the necessity for all such proceedings was obviated by the voluntary appearance and motion of said heirs, on which they were made parties defendant to the said causes. In this connection the respondent calls attention of the court to the fact — George B. West, one of the plaintiffs in this cause, who is as emphatic in his allegations contained in said bill as are the others, purchased certain property under the decrees in said consolidated causes, accepted deeds from the special commissioners therein, and still continues to hold the same.

Paragraph 10. In response to the tenth paragraph of said bill, in reference to the report of the 23d of April, 1880, of George M. Peek, special commissioner, this respondent says that it appears from the allegations of the plaintiff in said paragraph itself that the checks in question were drawn by the said Geo. M. Peek in favor of these parties, as alleged in the said report, and were delivered to the said Geo. B. West, notwithstanding the plaintiffs also deny that the said facts were true.

Whether the said parties refused to accept theirs from the said Geo. B. West or whether they were lost by him this respondent does not know. It is at least certain and established by the allegations of the plaintiffs themselves in said bill that the said Geo. B. West, who is now a party plaintiff to this suit, accepted his own as well as other checks from said special commissioner without objection.

It is likewise true that from the very inception of said consolidated causes the said Geo. B. West was a party defendant therein in a fiduciary capacity, and that in his individual capacity he purchased a portion of said Newport News land under decrees in said causes.

Paragraph 11. This respondent admits that in the year 1885 the plaintiffs and Elizabeth R. West instituted an action in ejectment against him and others, as alleged in the eleventh paragraph of said bill, and that after a hearing in the same the said plaintiffs
79 submitted to a nonsuit. He admits further that the court ruled that no evidence could be heard to attack or impeach the recitals of the decree of May 4th, 1872, in any collateral suit, not even deeming it necessary to pass upon the objection raised by the defendant therein to the competency of the plaintiffs therein as witnesses, but he denies that the court held that the plaintiffs in this suit had appeared in open court in proper person, if it be intended so to state in said bill; and he further denies that the counsel for the defence in said action based their defence on any such claim. Such a construction of said decree may have been mentioned in argument, as was likewise, as this respondent remembers, the fact that the said Chas. K. Mallory represented the heirs of Parker West.

Paragraph 12. This respondent is advised that it is unnecessary for him to answer the allegations in the 12th paragraph of said bill, except so far as he has done so in the preceding part of this answer, to which reference is hereby made.

Paragraph 13. This respondent alleges that John B. Whitehead has conveyed to him an undivided half interest in the twenty and one-half acres of lot No. 8, and not the whole interest, as alleged in said bill.

Some of the allegations and denials of this answer, referring in terms only to the plaintiffs, this respondent here repeats all such allegations and denials and includes therein Elizabeth R. West, who is now dead, so far as they refer to the conduct and knowledge of the plaintiffs in and about the proceedings in said consolidated causes or thereafter up to the death of said Elizabeth R. West.

Paragraph 14. The plaintiffs, prior to the institution of the said action of ejectment, may have indicated their willingness to refund the full amount of the purchase-money paid to the said special commissioners, with interest from the time of payment, but this respondent attached no importance thereto, as he now claims, and has always since the conveyance to him of the 9th day of April, 1885, claimed, that he is entitled to and owns a fee-simple interest in an undivided half of the twenty and one-half acres of lot No. 8; and he further says that if the said plaintiffs have refused to take money now on deposit to the credit of said consolidated causes, or

so much thereof as they may be entitled to receive, that they have done so of their own wrong, and this respondent is not concerned in any such refusal on their part. This respondent files with this answer a duly certified copy of the proceedings in said consolidated causes and prays it to be taken and considered as a part
80 hereof; and now, having fully answered, this respondent prays to be hence dismissed, with his reasonable costs.

And he will ever pray, &c.

ALFRED P. THOM, *Trustee.*

THOMAS TABB,
TUNSTALL & THOM, *P. D.*

Record of the consolidated chancery causes of—

BRINKLEY *vs.* LATIMER, &c.,

WILLIS and WIFE *vs.* LATIMER,
and
PEEK *vs.* WEST, &c.

Pending in the circuit court of Elizabeth City county, Virginia.

(Pages 128 and 129 of MS. record omitted.)

Bill in Chancery.

To the honorable the judge of the circuit court of the county of Elizabeth City:

Humbly complaining, sheweth unto your honor your complainant, Joseph B. Brinkley, the following case:

That on the 15th day of March, 1861, your complainant received a judgment in this court, on the common-law side thereof, against John A. Curtis, Thomas Latimer, and Parker West for the sum of four hundred dollars, with interest from Sept. 30th, 1857, and $8.12 costs, and in consequence of the destruction of most of the records by fire during the late war the record of said judgment was destroyed; but your complainant has established said judgment under the act of Assembly in that case made and provided. Copy of said order setting up and re-establishing said judgment is herewith filed, marked "A," and prayed to be taken as a part of this bill; that said John A. Curtis has been declared a bankrupt under his own petition and his estate neither has nor will pay any dividend; that
81 said Thomas Latimer and Parker West have no personal estate, as executions have been returned endorsed "No property," and your complainant has no means whereby he can obtain the amount justly due him, as evidenced by the judgment aforesaid, the whole of which is still unpaid, unless he subjects the real estate of which the said Thomas Latimer and Parker West are seized to the payment of his just and lawful demands.

Your complainant charges that the said Thomas Latimer is seized in fee of the following tracts and parcels of land:

1st. A lot on King street, in Hampton, Elizabeth City county, bounded south by that portion of the lot known as the Latimer lot, belonging to Jane C., the wife of W. R. Willis, north by the lot the property of the heirs of Henry Whiting, east by King street, and west by a lot belonging to a person unknown to your complainant.

2d. That said Thomas Latimer is, with W. R. Willis and Jane C., his wife, John Latimer, W. R. Thomas and Mary V., his wife, George Davis and Camilla, his wife, Linda Godwin, Lelia Godwin, seized as joint tenants in a certain lot of land situated in Hampton, county of Elizabeth City, bounded south by Queen St., north by the lands of J. B. Sinclair, east by ——, which said last-mentioned tract of land is at present undivided among the parties interested.

3d. That said Thomas Latimer is also seized of an undivided share in 15 acres of land in the county of Elizabeth City, bounded by the lands of Bates and Cumming.

Your complainant charges that since the rendition of the judgment as aforesaid the said Thomas Latimer conveyed the first-described tracts to W. S. Howard, as trustee, for the benefit of C. W. Hickman, and that said Thomas Latimer and John Latimer have conveyed the tracts No. 2 and 3 to James E. Turner for the benefit of W. S. Howard. Copies of said deeds are herewith filed, marked "B" and "C."

Your complainant charges that the said Parker West is seized of the following real estate in fee, all in the county of Elizabeth City:

1st. A tract of land containing 215 acres, bounded by the creek and the lands of Ivy and Williams.

2d. A tract of land containing 200 acres, bounded by Smith's lands and Parrish and the river.

3d. A tract of land containing 115 acres, of which the said Parker West holds an undivided share, the amount of which is not known to your complainant. This land is bounded by the lands of Lee, Parrish, and McLain.

4th. A tract of land containing 3 acres, bounded by the lands of Davis and Fitchett.

82 A lot of land situated in Hampton, bounded by the creek, Tennis, the road, and Ham.

6th. A lot of land situated in Hampton, bounded by S. Back street and the creek and Rudd.

In addition to the above your complainant charges that the said Parker West is entitled to the fee in the following lands, which have been confiscated by what is known as the confiscation law of the United States, to wit, the act of Congress, July 17th, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," and under which act certain proceedings were had in the United States courts and the life estate of said Parker West confiscated and sold, and the possession of said land is now in the purchasers for the life of the said Parker West; but your complainant charges that the judgment aforesaid, being had and docketed according to the requirements of the statute in such case made and provided long prior to any proceedings under the said confiscation act, is in no

ways affected by it and is a prior lien on said lands ahead of any title the purchasers at such confiscation sale may have acquired:

1st. A lot of land in Hampton, situated at the intersection of S. Back street and Queen street and bounded by the streets and the land of Watts.

2d. A tract of land known as Newport News, in said county, containing 303¼ acres, bounded by James river, the road, the creek, and the lands of Parrish and Burke.

Your complainant has been informed that some of the tracts of land herein described are subject to special liens ahead of your complainant's, but in consequence of the destruction of the records of this county he has been unable to ascertain the amount paid liens or to whom they are payable.

In tender consideration whereof, and forasmuch as your complainant is without remedy in the premises, save by the aid of a court of equity, where matters of this kind are alone properly cognizable; to the end, therefore, — your complainant prays your honor that said Thomas Latimer, Parker West, C. W. Hickman, W. S. Howard (trustee, and in his own right), James E. Turner (trustee), John Latimer, W. R. Willis and Jane C., his wife; Linda Godwin and Lelia Godwin (infants), John A. Curtis, and assignee of said John A. Curtis in bankruptcy, may be made parties defendant to this bill and requested to answer all and singular the allegations of the same; that a guardian *ad litem* may be appointed to defend the said infants in this suit; that an account may be taken showing the fee-simple and annual value of the real estate of which the
83 said Thomas Latimer and Parker West are, respectively, seized and of the liens for the sum and their priority, and that the real estate of said Latimer and West may be sold, or so much thereof as is necessary, and that payment may be decreed to your complainant of the amount to which he is justly entitled, and that all the necessary and proper accounts may be taken as may seem fit to your honor.

And your complainant prays generally for all such other and further relief in the premises consistent in equity and good conscience and which the nature of his case may require.

May it please, &c.

CHAS. K. MALLORY, *P. Q.*

Bill in Chancery.

In the Circuit Court of Elizabeth City County. In Chancery.

JOHN L. PEEK, Pl'ff, *vs.* PARKER WEST and GEO. B. WEST, Def'ts.

To the honorable judge of the circuit court of Elizabeth City county:

Humbly complaining, sheweth unto your honor John L. Peek, formerly of the county of Elizabeth City, now of the city of Richmond—

That your orator is the surviving partner of himself and Thomas

Peek, deceased, who were merchants trading under the firm of Thos. Peek & Son; that at the March term of the circuit court of Elizabeth City county, in the year 1867, the said firm recovered a judgment against Charles Jones and Parker West for the sum of seventy dollars and interest and costs in that behalf expended.

That at the same term of the said circuit court the president and directors of the Farmers' Bank of Virginia recovered a judgment for the sum of six hundred dollars, with interest, costs of protest, and their costs in that behalf expended, against Wm. Ivy, the said Parker West, and Thomas Peek, and your orator on a negotiable note, of which the said Wm. Ivy is maker and the said Parker West first endorser and the said firm of Thos. Peek & Son endorsers after him.

That the Norfolk Savings Institution, at the September term of said court in 1867, recovered a judgment for the sum of four hundred dollars, interest, costs of protest, and their costs in that behalf expended, against the same parties on a negotiable note
84 made by the said Ivy and endorsed by the said West and the said firm of Thos. Peek & Son in like manner as the note first aforesaid.

That G. W. Camp, also at the same term of the said court, recovered a judgment for the sum of two hundred and fifty dollars, interest, costs of protest, and costs in that behalf expended, against the same parties on a negotiable note, of which the maker is the said Wm. Ivy, and endorsed in like manner as the note first aforesaid.

That executions were issued on the three last-mentioned judgments, and that your orator, to prevent a levy on his goods and chattels under a general order of one Canby, late military governor of Virginia, paid the sum of $36 and $10.40 on the said judgment recovered by the president and directors of the Farmers' Bank of Virginia, the sum of $24.00 and $8.24 costs on the said judgment recovered by the Norfolk Savings Institution, and the sum of $15.12 and $9.10 costs on the judgment recovered as aforesaid by the said G. W. Camp; that said sums of money were paid by your orator in September, 1869; that the judgment first aforesaid and the said sums of money paid as aforesaid by your orator are still due your orator; that the said Charles Jones and William Ivy have been declared bankrupts on their own petitions since the recovery of the said judgments, and no part of the first-mentioned judgments can be made out of the said Charles Jones, nor can any part of the three last-mentioned judgments be made out of the said Wm. Ivy; that the said Parker West is possessed of no personal estate from which your orator can make the judgment aforesaid or any of the said several sums of money your orator has paid on the last-mentioned judgment; that the said Parker West is seized of a large real estate in the county aforesaid, viz: 1st, the reversion after an estate for his life, which was confiscated and sold by authority of the United States during the late civil war, in a tract of land known as "Newport News," situate on James river and bounded on the east by Newport News creek, west by the land of Burke's devisees, south by the James river, and north by the lands of Burke's devisees and George Melson's grantee, containing 303 acres, more or less; 2d, the absolute

fee in a certain other tract of land called "Casey's," containing 215 acres and bounded by the lands of Wm. Ivy, John Williams, Salter's creek and Casey's creek; 3d, the absolute fee in another tract known as "Burke's," bounded by the county road, James river, Casey's creek and Salter's creek and the land of Edward Parrish's heirs; the last-mentioned tract is covered by a prior lien by deed of trust probably to its full value.

That the said Parker West is seized of other real estate in
85 the said county which your orator, on account of the destruction of the records of this county, is unable to describe; that on the 14th day of March, 1867, before any of the aforesaid judgments were recovered, the said Parker West executed a conveyance of the said tract called "Newport's News" to George B. West in trust to secure the payment of large sums of money to creditors therein mentioned, which deed was duly recorded in the clerk's office of the county court of Elizabeth City county on the day last aforesaid, a copy of which is herewith filed, marked Ex. "A," and prayed to be taken as a part of this bill.

Your orator is advised that the said real estate is heavily encumbered by numerous judgments duly docketed in the clerk's office of the county court of the said county as well as by the aforesaid deed of trust.

In tender consideration whereof and forasmuch as your orator is remediless in the premises save by the aid of a court of equity, where matters of this nature are properly cognizable and relievable, to the end, therefore, that justice may be done in the premises, your orator prays that the said Parker West and Geo. B. West may be made parties defendant to this bill and required to answer the same on oath.

That an account be taken of the real estate of said Parker West and the nature and amount of his interest therein; that an account be taken of the annual and fee-simple value of the real estate; also an account of what is due your orator by heirs in the said real estate of the claims secured (whether by judgment or deed of trust) by liens on the said real estate, their nature, amounts, and priority; that the said real estate, or so much thereof as may be necessary, may be sold and the proceeds thereof be applied in proper order to the payment of your orator's said claims; that proper process may issue, and that your orator may have such further relief, both of a general and special character, as his case may require and to equity shall seem meet.

And your orator will ever pray, &c.

G. M. PEEK, *P. Q.*

Ex. "A." Filed with Bill.

Deed of Trust.

This deed, made this 14th day of March, 1867, between Parker West, of the first part, and George B. West, as trustee, of the second part, all of the county of Elizabeth City, State of Virginia, witnesseth:

That for the consideration and for purposes hereinafter mentioned the said Parker West does by these presents grant and convey unto said Geo. B. West, as trustee, the following property, to wit: All that certain tract of land in the county of Elizabeth City,
86 State of Virginia, known as Newport News, bounded on the east by Newport's News creek, on the west by Burke, on the south by James river, and on the north by Burke and Melson, upon trust to secure the payment of the following debts due by the said Parker West, namely: Bond of Parker West to Arthur West for $739.47, with interest from Nov. 25th, 1859; bond of Parker West to John Tabb, Senior, guardian of George S. West, dated Jan'y 1st, 1860, for the sum of $800, with interest from its date; bond of said Parker West and William Wood for $200.00, with interest from 1st Jan'y, 1860; bond of Parker West to Jesse P. Hope for $150, dated somewhere in the year 1860 or 1861; also two bonds of said Parker West to Mary Shield, amounting in the aggregate to the sum of $125 or thereabouts, given within 4 or 5 years before the war, 1861; also bond of said Parker West to Sarah B. Watson for the sum of one thousand dollars, dated 1st day of Jan'y, 1867, or thereabouts; also three notes of said Parker West to the Hampton Savings Institution, one for eighty-four ($84) dollars, another for $76.00, another for $480, all of which notes fell due some time in the year 1860 or 1861, and any other note of the said Parker West to the said Hampton Savings Institution in which he is principal; also a note of Thomas Watts, Senior, the principal and interest of which does not exceed $30; also note or bond of the said Parker West to C. K. Mallory, dated 22d May, 1861, for $100; also another note or bond to said Mallory for $65.79, dated 10th of April, 1859 (the list of indebtedness hereby secured is stated from memory, and any inaccuracy in dates or amounts not altogether at variance with the foregoing statement as to amounts and date consistent with ordinary recollection and memory is not in any way to affect this deed; the papers, when produced by the holders of the same, will show their dates and amounts); also open account of A. Adler, not exceeding $100 on the 1st January, 1861, and open account due to the late firm of Mellen & Son, not exceeding $100 on the 1st January, 1861.

Witness the following signature and seal.

PARKER WEST. [SEAL.]

Witness:

GEO. B. WEST.

STATE OF VIRGINIA, *County of Elizabeth City:*

I, James E. Turner, a notary public for the county aforesaid, do certify that Parker West, whose name is signed to the an-
87 nexed and foregoing writing, bearing date the 14th day of March, 1867, has acknowledged the same before me in my county aforesaid.

Given under my hand this 14th day of March, 1867.

JAMES E. TURNER,
Notary Public.

CLERK'S OFFICE OF THE COUNTY COURT OF
ELIZABETH CITY COUNTY, MARCH 14*th*, 1867.

This deed was received and, with the certificates thereto annexed, and being stamped with U. S. rev. stamps according to law and said stamps cancelled, was admitted to record.

Teste: WM. S. HOWARD, *Cl'k.*

Decree. Sept. 6th, 1870.

BRINKLEY
vs.
LATIMER, WEST, *et al.*

WILLIS and *ux.*
vs.
LATIMER *et al.*

PEEK
vs.
WEST and WEST.

} In Chancery.

By consent of parties these causes are consolidated and hereafter ordered to come on to be heard together; the first of these causes on the bill of the complainant taken for confessed at the rules as to all the adult defendants, the answer of the infant defendants filed at rules by Wm. S. Howard, their guardian *ad litem*, appointed at rules to defend them in this suit, and general replication of the plaintiffs thereto; and the second of these causes on the papers formerly read, and the third of these causes on the bill of the complainant taken for confessed as to all the defendants, and was argued by counsel.

On consideration whereof the court doth A., O., and D. that one of the commissioners of this court take the following accounts:

First. An account of the real estate of which the defendant
88 Thomas Latimer is seized and possessed, and of its annual and fee-simple value, and whether in such portions of said real estate which is held in coparcenary by said Thomas Latimer and the other defendants of this suit or either of them partition can be conveniently made of such real estate, or whether the interests of all the said coparceners will be promoted by a sale of the entire subject or allotment of part and sale of the residue, or whether any one of the said coparceners is willing to accept the entire subject and pay therefor to the other coparceners what their interest entitles them to receive.

Second. An account of all the liens upon the said lands of the said Thomas Latimer, their nature and priority.

Third. An account of all the real estate of which the defendant Parker West is seized, its annual and fee-simple value, and the claim of title to any parties for any portion thereof, and the character and circumstances attending the same.

Fourth. An account of all the liens upon the said lands of the said Parker West, their character and priority; which said accounts the said com'r is directed to examine, state, and settle, and to the court report, together with any matter specially stated deemed pertinent by himself or which shall be required by any of the parties to be stated; and in taking said accounts said commissioner is directed to fix a time and place for taking the same and give notice thereof by publication in some newspaper published in the city of Norfolk once a week for four weeks, which publication, when completed, shall be equivalent to personal service of said notice on all parties interested.

Report of Com'r Howard. March 13th, 1871.

OFFICE OF COMMISSIONER IN CHANCERY OF
ELIZABETH CITY COUNTY, *Feb'y 15th*, 1871.

To the Hon. Geo. T. Garrison, judge of the circuit court of the county of Elizabeth City:

James E. Turner, dec'd, late commissioner in chancery of said court, having given the notice required by the decree in the consolidated chancery causes of J. G. Brinkley *vs.* Thos. Latimer and others, J. L. Peek *vs.* Parker West, &c., and another entered on the 6th day of Sept., 1870, a certificate of the publication of said notice is herewith filed, I proceeded, at the office of said James E. Turner, dec'd, on the 15th day of Nov., 1870, to take the accounts as directed by said decree, and file herewith four accounts, numbered, respectively, 1, 2, 3, and 4, and are as follows:

89 No. 1 is an account of the real estate of which the defendant, Thomas Latimer, is seized and possessed, and of its annual and fee-simple value, and the special liens on the same, by which it will be seen that said Thos. Latimer owns two-thirds of a lot of land in Hampton, Elizabeth City county, Va., bounded by the lots of Whiting, Howard, Hope, and the street. The remaining one-third of said lot is owned by Mrs. Jennie C. Willis, wife of Wm. R. Willis. Partition has been made between them, said Jennie C. Willis getting a front of 33⅓ feet of said lot next to and adjoining the lot of Mary F. Howard; also one-seventh interest in the lot of land in Hampton, Elizabeth City county, bounded by Queen street and the lots of Coote and Ham. Your com'r reports that this lot of land is not susceptible of partition from its size and shape and the number of parties among whom it is to be divided; that neither of the parties is willing to accept the same and pay to the other parties what their interest entitles them to receive; that the interest of all the parties will be promoted by a sale of the entire lot and the proceeds divided among the parties according to their respective interest; and also one-third interest in 15 acres of land in Elizabeth City county, Va., bounded by Cumming and Bates. The interest of John Latimer and Thomas Latimer (one-third each) in said 15 acres of land is under lien by deed of trust to J. E. Turner, trustee, for the benefit of Wm. S. Howard for $125.00, with interest from 26th of

of March, 1869, and will have to be sold. The remaining one-third is owned by Mrs. Jane C. Willis, the wife of Wm. R. Willis, who desires that her share of the said land be allotted to her, which can be conveniently done.

No. 2 is an account of all the liens upon the lands of Thomas Latimer, their nature and priority. At the instance and request of the complainant your com'r reports that the rents and profits of all the real estate of T. Latimer will not satisfy the liens thereon in five years.

No. 3 is an account of the real estate of which Parker West is seized in the county of Elizabeth City, together with all the liens thereon of a special nature. No. 1 in said account is a tract of land in Elizabeth City county, Va., containing 215 acres, bounded by the lands of Ivy, Williams, and the creek. No. 2 in said account has been sold to satisfy the special lien thereon due to Geo. S. West and sold for $665.00, which left a balance due said West on the 22d day of December, 1870 (the day said land was sold), of $—. No. 3 in said account has also been sold to satisfy the special lien thereon due to Mary A. Burke, ex'x of Wm. Burke, dec'd, which sold for the sum of $4,025.00, the amount, principal and interest, of said Burke's special lien. Tract of land No. 4 in said account, containing
90 303¼ acres, situated in Elizabeth City county, bounded by the road, the creek, Parrish, the river, and Burke's, is under lien of a deed of trust executed by P. West to G. B. West, trustee, bearing date March 14th, 1867, and is special liens, class No. 2, of said account. Your com'r reports that this tract of land is now in the possession of J. B. Alexander and J. J. Bowen, under a title derived from the marshal of the United States for the — district of Virginia, said land having been sold, under what is known as the confiscation act, in 1864. Your com'r is satisfied and so reports, at the instance and request of the complainant, that the rents and profits of said land will not satisfy the liens thereon in five years. Your com'r in using the term "said lands" means all the lands of Parker West, had none of said land been confiscated as aforesaid. No. 5 of said account No. 3 is a three-acre lot of land in Hampton, Elizabeth City county, Va., bounded by the lands of Davis and Fitchett. No. 6 in said account is a lot of land in Hampton, Elizabeth — county, Va., bounded by Tennis, Ham, creek, and the road. No. 7 is a lot of land in Hampton, bounded by the South Back St., Whiting, and the creek. No. 8 in said account No. 3 is a lot of land bounded by the Back street and Armistead. No. 9 in said account is a lot in Hampton, bounded by the Back street and the Main street. This lot is in the possession of Calvin Pepper, trustee, under a title derived from the marshal of the United States for the — district of Virginia, said lot having been sold, under what is known as the confiscation act, in 1864.

No. 4 is an account of all the liens upon the lands of Parker West, their character and priority.

All of which is respectfully reported.

Com'r's fee, $105.

WM. S. HOWARD, *Com'r.*

ACCOUNT NO. 1.

An Account of the Real Estate of which the Defendant, Thos. Latimer, is Seized and Possessed, and of its Annual and Fee-Simple Value, and the Special Liens on the Same.

1st. An undivided two-thirds interest in a lot of land in Hampton, Elizabeth City county, Va., bounded by the lots of Whiting, Howard, Hope, and the Main street. The fee-simple value of the whole of said lot is $500.00 and the annual value $75.00. The interest of said Latimer in this lot is under the lien of a deed of trust executed by said T. Latimer to W. S. Howard, trustee, for the benefit of C. W. Hickman, dated Oct. 21st, 1865, and duly recorded, for $150.00, with interest from October 21, 1865.

91 2d. An undivided one-seventh interest in a lot of land in Hampton, Elizabeth City county, Va., bounded by Queen street, the lots of Coote and Ham. The fee-simple value of the whole of said lot is $500.00 and of the annual value of ——. The interest of said Latimer in this lot is under the lien of a deed of trust executed by said T. Latimer and John Latimer to James E. Turner, trustee, for the benefit of Wm. S. Howard, dec'd, dated March 26th, 1869, and duly recorded, for $125.00, with interest from 26th of March, 1869. Copy of this deed, marked "C," filed.

3d. An undivided interest of one-third in fifteen acres of land in Elizabeth City county, Va., bounded by Cumming and Bates. The whole of said 15 acres is of the fee-simple value of $150.00 and of no annual value. John and Thomas Latimer's interest in this land is also conveyed in the aforesaid deed to J. Turner, trustee, for the benefit of W. S. Howard.

ACCOUNT 2.

An Account of All the Liens upon the Lands of Thomas Latimer, Their Nature and Priority.

1. General lien.

J. B. Brinkley *vs.* John A. Curtis, Parker West, and T. Latimer:

Judgment 15th March, 1861	400 00
Int. from 30th Nov., 1857.	
Costs of original judgment	8 12
Costs of setting up judgment	11 37

This is a security debt for J. A. Curtis and will have to be paid by West and Latimer, J. A. Curtis being a bankrupt.

Bond Thomas Latimer to C. W. Hickman	150 00
With interest from 21st Oct., 1865.	

This bond is secured by deed trust executed by T. Latimer to W. S. Howard, trustee for C. W. Hickman, bearing date as above and duly recorded, on the lot of land No. 1, named in account No. 1.

The Hampton Savings Institution *vs.* Thos. Latimer and C. L. Smith:
Judg. cir. c't Eliz. City Co. Mar. 15, 1867 ..... 51 00
Int. from 2d of May, 1861.
Costs 7 12

92 The Hampton Sav. Inst. *vs.* Thos. Latimer, C. S. Smith, and C. C. Jett:
Judg. March 15, 1867 ..... 140 00
Int. from 19th of April, 1861.
Costs 7 66

The Same *vs.* Thos. Latimer and J. B. Cary:
Judg. same time 40 00
Int. from 6th June, 1861.
Costs 7 50

C. K. Mallory, assignee J. S. Moody, *vs.* Thos. Latimer:
Judg. Sept., 1868 ..... 106 42
Int. from 1st July, 1867.
Costs 7 57

W. S. Howard, adm'r, *vs.* Thos. Latimer:
Judg. March 15, 1869 ..... 120 00
Int. on $60.00 from 1st Jan'y, 1860, and on $60.00 from 1st Jan'y, 1861; credit by $40.50 paid Dec. 7, 1860.
Costs 7 50

Bond of T. Latimer, prin., and J. Latimer, security, to W. S. Howard, due Mar. 26th, 1870, for 125 00
Int. from Mar. 26, 1869.
This bond is secured by deed of trust executed by T. Latimer and J. Latimer to J. E. Turner, trustee, dated Mar. 26th, 1869, and duly recorded, on Nos. 2 and 3, mentioned in account No. 1.

P. Ware, Jr., for Wm. Anderson, *vs.* Wm. Curtis, P. West, and T. Latimer:
Judg. dis. c't U. S. for — dis. of Va., Mar. 19, '69 ..... 508 00
With interest on $118.00 from July 16, '61; int. on $124.00 from July 16, '62; on $130.00 from July 16, '63, and on $136.00 from July 16, 1864.

Account 3.

An Account of the Real Estate of which Parker West is Seized in the County of Elizabeth City, Together with the Liens upon the Same of a Special Nature.

1st. A tract of land in Elizabeth City county, Va., containing about 215 acres, bounded by the land of Ivy, Williams, and the creek, of the fee-simple value of $4,300.00, and of the annual value of ——.

93

2d. An undivided one-half interest in 115 acres of land in Elizabeth City county, Va., bounded by the lands of Lee and Parrish, the whole of which said tract is of the value of $1,380.00 and no annual value, being wood land. This tract of land is under the lien of a deed

of trust to W. R. Willis, trustee, for the benefit of Geo. S. West, of the principal sum of $800.00, with interest thereon from Jan'y 1st, 1860, and is bond No. 2 among the special liens mentioned in this account. Said West's interest in this land was sold by said trustee December 28, 1870, at the request of said Geo. S. West, and bro't $665.00, leaving a balance of $708.41, as of May 1, 1871, due Geo. S. West, after deducting expenses of sale from said am't of trust sale.

3d. A tract of land of 200 acres in Elizabeth City county, Va., bounded by the lands of Smith, Parrish, and the river, of the fee-simple value of $4,000.00 and of the annual value of $200.00. This tract of land is under the lien of a deed of trust executed by W. Ivy to John Hawkins and P. West, trustees, for the benefit of Wm. Burke, to secure the payment of the principal sum of $3,800.00, which amount has been reduced by various payments made by said P. West to the sum of $2,410.89, as of the 29th of Sept., 1860, rec'd by Wm. Burke; copy said deed herewith filed, marked "B."

4th. A tract of land containing 303¼ acres in Elizabeth City county, Va., bounded by the road, the creek, Parrish, and the river and Burke, of the fee-simple value of $9,097.50 and of the annual value of $350.00. This tract of land is under a deed of trust executed by Parker West to G. B. West, trustee, bearing date March 14th, 1867, and recorded on the same day, and secures the twelve bonds and two open accounts mentioned under the head of class No. 2, special liens, and appended to the top of this page.

5th. A tract of three acres in said county of Elizabeth City, bounded by the land of Davis and Fitchett, of the fee-simple value of $60.00.

6th. A lot of land in Hampton, Elizabeth City county, Va., bounded by Tennis, the creek, the main road, and Ham, of the fee-simple value of $100.00.

7th. A lot of land in Hampton, Va., bounded by South Back street, Rudd, and the creek, of the fee-simple value of $100.00.

8th. A lot of land in Hampton, Va., bounded by the Back street and Armistead, of the fee-simple value of $100.00.

9th. A lot of land in Hampton, Va., bounded by the Back and Main streets, of the fee-simple value of $200.00.

94 *An Account of All the Liens Upon the Land of Parker West, Their Character and Priority.*

Class 1—General liens.

J. B. Brinkley *vs.* John A. Curtis, P. West, and T. Latimer:	
Judg. 15th March, 1861	400 00
Int. from 30th Nov., 1857, to 1 ——.*	
Costs of orig. judg.	8 12
" " setting-up judg.	11 37
This judg. is a lien on all the real estate of P. West.	
M. L. Lake, assignee of A. B. McClean, *vs.* Wm Ivy, and P. West:	
Judg. Sept. 20, 1866	675 00
Int. from 1 Jan'y, 1860, to 1 May, 1861.*	
Costs	10 88

* Paid.

J. W. Whitehurst & Co. *vs.* Wm. Ivy, P. West, and T. Peek:
Sept. 20th, 1866, judg. 833 66
Int. from 25th of May, 1861, to 1 May, 1871.
Costs 9 42

A. Tunstall, cashier of J. W. Whitehurst, *vs.* Wm. Ivy, P. West, and Thos Peek:
Judg. Sept. 20th, 1866 ..... 232 70
Int. from 13 July, 1861, to 1 May, 1871.
Costs 8 92

Virg. Cooper, assignee of Jas. Phillip's adm'r, *vs.* Wm. Ivy and P. West:
Judg. Sept. 20th, 1866 ..... 100 00
Int. from Jan'y 7, 1860, to 1 May, 1871.
Costs 7 98

S. Garrow, adm'x, *vs.* Chas. Jones and P. West:
Judg. Sept. 20, 1866 ..... 130 00
Int. from 1 Jan'y, 1856, to 1 May, 1871.
Costs 7 96

John Wray, adm'r, *vs.* Wm. Ivy and P. West:
Judg. Sept. 20, 1866 ..... 75 00
Int. from 1 Jan'y, 1861, to 1 May, 1871.
Costs 7 96

95 Edward King, assignee, *vs.* Parker West:
Judg. Sept. 20, 1866 ..... 200 00
Int. from 1 Jan'y, 1861, to 1 May, 1871.
Costs 7 80

Class No. 2—Special liens.

1. Bond Parker West to A. West 739 47
Int. from 25 Nov., 1859, to 1 May, 1871.
This bond is held by W. S. Howard and T. M. Joynes.

2. Bond Parker West to G. S. West, g'd'n 800 00
Int. from 1 Jan'y, 1860, to 1 May, 1871.
Balance due on this debt, $708.41, with int. from 1 Jan'y, 1871.

3. Bond P. West to Wm. Wood .....
Int. from Jan'y 25th, 1855.

4. Bond P. West to J. P. Hope 150 00
Int. from 1860 or 1861.

5. Bond P. West to Mary Shield 125 00
Int. from 1857.

6. Bond P. West to S. B. Watson 1,000 00
Int. from 1 Jan'y, 1857.
Assigned to G. B. West. *

7. Bond P. West to Hampton Sav. Ins. 480 00
Int. from June 2, 1861 ..... 290 40
770 40

Judg. was obtained on this bond Mar., '67, cir. c't Eliz. City Co.

*Paid in his purchase.

8. Bond P. West to same 76 00
Int. from May 9, 1861.
Judg. was obtained on this bond Mar., '67, cir. c't Eliz. City Co.
9. Bond P. West to same 84 00
Int. from July 27, 1861.
Judg. was obtained on this bond Mar., '67, cir. c't Eliz. City Co.
10. Bond P. West to T. Watts, Sr. 30 00
Int. from 1861.
11. Bond P. West to C. K. Mallory 100 00
Int. from May 22d, 1861.
12. Bond P. West to same 65 79
Int. from April 10, 1859.
Now held by W. S. Howard.
96 13. Open account due A. Adler 99 75
Int. from 24 April, 1860.
Costs 10 04
Held by Wm. S. Howard's assignee.
14. Open account due M. Mellen & Son 100 00
Int. from 1861.

Lien 3 is by deed of trust from P. West to G. B. West, trustee, bearing date March 14th, 1867, and admitted to record on same day, conveying tract of land No. 4.

A bond of P. West to Wm. Wood, secured in the said deed, is not here reported. The bond, with interest to April 7th, 1874, amounts to $593.33, and has been paid.

Judg. Cir. C't Elizabeth City County.

1. The President, Directors, and Company of Farmers' Bank of Va. *vs.* Wm. Ivy, P. West, J. S. Peek, and Thos. Peek, late merchants under the style of Thos. Peek & Son:
Judg. March 15, 1867 ..... 602 60
Int. from 29 June, 1861, to 1 May, 1871.
Costs 9 82
2. S. Garrow, adm'x, *vs.* Wm. Ivy and P. West:
Judg. same time 80 00
Int. from Jan'y 1, 1853, to 1st day of May, 1871.
Costs 8 12
3. Thos. Peek *vs.* P. West:
Judg. same time 120 00
Int. from Dec. 26, 1856, to 1 May, 1871 ..... 110 40
Costs 8 46
238 86
4. Thos. Peek & Son, assignees, *vs.* Parker West:
Judg. same time 45 61
Int. from Jan'y 1, 1859, to May 1, 1871.

Costs 7 46
Credit by $6.56, paid Aug. 4, 1859, and $4.10, paid April 10, 1861.

5. Hampton Savings Inst. *vs.* Wm. Ivy, P. West, and Thos. Peek.

97 Judg. March 15, 1867 ..... 600 00
Int. from 9th May, 1861, to 1 May, 1871.
Costs 9 36

6. Same pl't'ff *vs.* same def'ts:
Judg. same time 300 00
Int. from 6th July, 1861, to 1 May, 1871.
Costs 9 36

7. Same *vs.* W. R. Willis and P. West:
Judg. same time 900 00
Int. from 11th Dec., 1860, to 1 May, 1871.
Costs 8 78

8. Jno. D. Gordon & Co. *vs.* P. West:
Judg. same time 276 66
Int. from 6th June, 1861, to 1 May, 1871.
Costs 8 78

9. M. B. Smith *vs.* Wm. Ivy, P. West, and W. C. Marrow:
Judg. 318 25
With int. from 13th May, 1856, to 1 May, 1871.
Costs 8 50
This judg. is subject to a large credit.

10. The Norfolk Savings Ins., endorsed of Thomas Peek & Son, *vs.* W. Ivy, P. West, Thos. Peek, and J. L. Peek, late merchants, under the style of Thomas Peek & Son:

Judg. Sept. 16th, 1867	402 60	
Int. from June 30, 1861, to 1 May, 1871	243 57	
Costs	8 86	
		665 03

2. M. B. Smith, for A. C. Tabb, *vs.* W. H. S. Holcroft, P. West, and Thos. Peek:
Judg. same time 560 43
Int. from 11th of May, 1858, to 1 May, 1871.
Costs 9 18

3. S. Garrow, adm'x, *vs.* P. West, survivor of Sam. Celey:
Judgment same time 130 00
Int. from 1st Jan'y, 1857, to 1 May, 1871.
Costs 6 84
Credit by $99.78, p'd Feb. 8, 1859, and by $30.00, paid Jan'y 10, 1861.

98 4. M. B. Smith, assignee C. K. Mallory, *vs.* W. P. Marrow and P. West:
Judg. same time 112 50
Int. from Jan'y 1, 1860.
Costs 8 30

5. Thos. Peek & Sons, assignees James Parker, *vs.* Chas. Jones and Parker West:
Judg. Sept. 16, 1867 ..... 70 00
Int. from 1st Oct., 1851.
Costs 8 02

6. G. W. Camp *vs.* Wm. Ivy, P. West, and Thomas Peek and J. L. Peek, late partners under style of Thos. Peek & Son:
Judg. same time 252 10
Int. from July 26, 1861.
Costs 9 10

1. C. K. Mallory, assignee J. S. Moody, *vs.* P. West:
Judg. Sept., 1868 ..... 73 89
Int. from 1 April, 1868.*
Costs 7 42
This judg. in favor of Moody's assignee has been settled.

2. M. A. Shield, per. rep., *vs.* P. West:
Judg. same time 119 44
Int. from 1 Aug., 1856.
Costs 6 84
It is supposed that this is the same debt mentioned in Mr. West's deed trust, am't'g to $125.00, due Mary Shield. It is the same.

A. Adler *vs.* P. West:
Judg. Sept., 1868 ..... 99 75
Int. from 24th April, 1860.
Costs 10 04
This claim is secured in deed of P. West to G. B. West, hereinbefore referred to, and is No. 13 among special liens.

99 *Judgments Cir. C't Warwick County.*

1. W. H. Curtis, adm'r, *vs.* P. West:
Judg. Sept., 1868 ..... 190 00
Int. on $90 from 1 Jan'y, 1860, and int. on $100 from 29th April, 1850.

2. Same pl't'ff *vs.* same def't:
Judg. same time 74 00
Int. from Jan'y 1, 1849.

3. Same *vs.* Same:
Judg. same time 115 00
Int. Jan'y 1, 1860.

Wm. Lee's per. rep. *vs.* Rob't Davis and P. West:
Judg. March 15, 1869 ..... 175 00
Int. from Jan'y 1, 1859.
Costs 8 02

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*Settled.

J. B. Cary, assignee, *vs.* P. West:
Judg. same term 51 00
Int. from May 31, 1861.
Costs 7 72
P. Ware, Jr., for Wm. Anderson, *vs.* Wm. Curtis, P. West, and T. Latimer, and assigned to L. H. Sclater:
Judg. in the dist. court U. S. for the — dis. of Va., May 19th, 1869 ..... 508 00
With int. on $118 from July 16th, '61; int. on $124.00 from July 16th, '62; on $130.00 from July 16, '63; $136.00 from July 16th, '64.
Costs 25 00
F. Mallory, ex'x, *vs.* T. Joynes and P. West:
Judg. Sept. 1, 1870 ..... 25 00
Int. on $10.00 from 1 Jan'y, 1852, and on $15.00 from 1 Jan'y, 1853, to 1st day May, 1871.
Costs 8 02
Same *vs.* P. West:
Judg. same term 20 00
Int. from 1 Jan'y, 1854, to 1 May, 1871 ..... 20 80
Costs 7 94
Bond of P. West to C. L. Smith, ex'or 43 21
Int. from day.
100 Bond P. West to M. L. Lake 20 00
Int. from 2d Jan'y, 1860, to 1 May, 1871.
Bond G. M. Adams and P. West to S. S. Howard, dated Jan'y 1, 1853, due Jan'y 1, 1855, for $35.00, subject to credit of $25.00, as of 5th Jan'y, 1855; am't due Jan'y 5, 1855 ..... 12 10

Decree. May 4th, 1871.

BRINKLEY and WHITING *vs.* LATIMER, &c.
WILLIS and WIFE *vs.* LATIMER, &c.
PEEK *vs.* WEST and WEST.
} In Chancery.

These causes this day again came on to be heard upon the papers formerly read and the report of Com'r Wm. S. Howard, to which report no exceptions are filed, and was argued by counsel.

On consideration whereof the court doth A., O., and D. that said report of Com'r Wm. S. Howard be, and the same is hereby, confirmed; and the court doth A., O., and D. that Thomas Tabb, Chas. K. Mallory, and Geo. M. Peek, as special com'rs, sell at public

auction, at the cross-streets in the town of Hampton, on some county court day, after thirty days' previous notice thereof by publication twice a week for four successive weeks in some newspaper of the city of Norfolk and by bills posted at three or more public places in the county of Elizabeth City, the following real estate, or on the premises on some other day, as in their judgment they may deem best:

All the right, title, and interest of Thomas Latimer, being two-thirds of the lot of land located in Hampton and bounded by the Main street and the lot of Whiting, Howard, and Hope.

All the right, title, and interest of Thomas Latimer, being one-third, in the tract of land, containing fifteen acres, bounded by the lands of Cumming and Bates.

All that certain tract of land, the property of Parker West, located in the county of Elizabeth City and bounded by Salt-
101 ford's creek and the lands of Ivy and Williams, containing two hundred and fifteen acres (215), more or less.

All the interest of Parker West in that certain tract of land known as Newport's News, containing three hundred acres, more or less, and bounded by the lands of Parrish, Hamlin (formerly Burke's), and the James river.

All the interest and estate of Parker West in that certain parcel of land, containing three acres, located in the county of Elizabeth City and bounded by the lands of Davis and Fitchett.

All that certain lot of land located in the town of Hampton, bounded by the lot of Tennis, the creek, the main road, and the lot of William Ham.

All that certain lot of land in the town of Hampton, bounded by the South Back street, Rudd, and the creek.

All that certain lot of land located in the town of Hampton and bounded by the Back street and the lot of Armistead.

All the interest and estate of Parker West in that certain lot of land located in the town of Hampton and bounded by the Back and Main streets.

Also that certain lot of land described in the proceedings of the second of these causes, situated in the town of Hampton, county of Elizabeth City, of which Mary A. Willis died seized, bounded by Queen street and the lots of Coot and Ham—

Upon the following terms: Sufficient cash to pay the costs of suit and expenses of sale, and the remainder upon a credit of one, two, three, and four years, with liberty to the purchaser to anticipate any or all of the deferred payments; the purchaser to execute his bonds to the com'rs executing this decree, with approved personal security for the deferred payments, with interest from the day of sale. Should it, in *the* judgment, be to the interest of the parties interested to subdivide any of the said tracts or lots of land into one or more parcels, they are hereby authorized to subdivide the same into such lots and parcels as their judgment may approve; and in making said sale the said special com'rs will *accept* from sale, until the further order of the court, the fifty acres of that portion of the said tract of land called Newport's News, which it is alleged the

said Parker West has recently contracted to sell to one A. J. Ford, and also that portion of said Newport's News tract of land which the said Parker West has recently contracted to sell to G. B. West, both of which said contracts, it is alleged by the def't, P. West, are in writing and are duly recorded in the clerk's office of the county court of Elizabeth City county, Virginia, the said exceptions to be ascertained by the said special com'rs by inspection of the
102 records of said county court; but before the said special com'rs shall receive any money under this decree they shall execute their joint bond, in the penalty of $1,000, before the clerk of this court, in his office, payable to the Commonwealth of Virginia and conditioned for the faithful performance by them of their duties under this decree; and said special com'rs are authorized, if in their judgment they may deem it advisable and to the interest of the creditors of said Parker West so to do, to confirm said contracts of said P. West with said A. J. Ford and Geo. B. West, subject, however, to the ratification of this court.

Report of Special Com'rs. Nov., 1871.

In the Circuit Court of Elizabeth City County, Virginia. In Chancery.

BRINKLEY and WHITING *vs.* LATIMER, WEST, *et al.*

WILLIS and *ux. vs.* LATIMER *et al.*

PEEK *vs.* WEST.

In obedience to a decree rendered in the above consolidated causes at the May term, 1871, of the court aforesaid, the undersigned special com'rs, appointed by said decree to sell the tracts of land and lots therein described, respectfully report that, after giving the notice required by said decree, by posting at the door of the court-house of said county and at two or more public places therein and by publication thereof in the "Norfolk Virginian," a newspaper published in the city of Norfolk, a copy of which notice is herewith filed, they did, on the 22d day of June, 1871, offer the following lots of land for sale at public auction, and the parties hereinafter named became the purchasers at the sums mentioned, to wit:

No. 1. All the interest of P. West in that certain piece of land containing three acres, located in said county of Elizabeth City and bounded by the lands of Davis and Fitchett, of which Phil. Davis became the purchaser for the benefit of —— Davis, at the sum of sixty-five dollars, that being the highest bid. Fifteen dollars of the said sum was paid in cash, and his four bonds, with Lewis Davis as security, payable in one, two, three, and four years, equal installments, with interest from date, were taken for the deferred payments.

103 No. 2. The interest of Thomas Latimer (being two-thirds in fee) in the lot of land in Hampton, bounded by the Main street or King street, and the lots of Whiting, Hope, &c., of which Geo. M.

Peek became the purchaser at the sum of three hundred dollars, that being the highest bid; and your commissioners took from the said purchaser his four bonds, with Wm. J. Stores as his security, in the sum of seventy-five dollars each, and payable in one, two, three, and four years, with interest from date, for the deferred payments. Your com'rs did not receive any of the purchase-money for this lot in cash.

No. 3. A lot of land in Hampton, county of Elizabeth City, bounded by the lots of Tennis, the creek, and the main road, and Ham, of which L. Sheetz became the purchaser at the sum of one hundred and twenty dollars, that being the highest bid, twenty-five dollars of which was paid in cash, and your com'rs took his four bonds, with T. S. Tennis his security, in the sum of twenty-three $\frac{75}{100}$ dollars each, and payable in one, two, three, and four years, respectively, with interest from date, for the deferred payments of the purchase-money.

No. 4. That certain lot of land in Hampton, Virginia, bounded by the lot of Rudd, the creek, and the south Back street, of which H. C. Whiting became the purchaser for the sum of eighty-five dollars, that being the highest bid, twenty-five dollars of which he paid in cash, and your commissioners took his four bonds, with Kennon Whiting his security, each for the sum of fifteen dollars, payable in one, two, three, and four years, respectively, with interest from date, for the deferred payments of the purchase-money.

No. 5. That certain lot of land in Hampton, bounded by the Back street and the lot of Armistead, of which Geo. Felton became the purchaser at the sum of one hundred and twenty dollars, that being the highest bid, twenty-five $\frac{75}{100}$ of which was received in cash, and your com'rs took from him, with Chas. K. Mallory his security, his four bonds in the sum of twenty-three $\frac{56}{100}$ dollars each, payable in one, two, three, and four years, respectively, with interest from date, for the deferred payments.

No. 6. All the interest of P. West in that certain lot of land in Hampton, bounded by the Back street and Main street, of which Chas. K. Mallory became the purchaser at the sum of four hundred and eighty-five dollars, that being the highest bid, fifty-five dollars of which he paid in cash, and for the remainder he executed his four bonds, with Wm. S. Howard his security, payable in one, two, three, and four years, with interest from date, according to the terms of the sale herewith.

104 No. 7. That certain lot of land in Hampton, Va., bounded by Queen street and the lots of Coote and Ham, of which Mary A. Willis died seized, of which Wm. S. Howard became the purchaser at the sum of four hundred and eighty dollars, that being the highest bid. The said Wm. S. Howard was seized of five-sevenths of the said lot and only two-sevenths was sold, for which the said Wm. S. Howard paid one hundred and thirty-seven $\frac{14}{100}$ dollars in cash, which was the full amount of the purchase-money for said lot, conveyed by deed to him, having paid all that is due thereon.

The following exhibit will show what your com'rs have received in cash and what they have paid:

Rec'd of P. P. Davis, cash payment	$15 00
" " C. K. Mallory, " "	55 00
" " G. Felton " "	25 75
" " H. C. Whiting, " "	25 00
" " L. Sheetz, " "	25 00
" " Wm. S. Howard, " "	37 14
Total	$282 89

Paid to Wm. S Howard, com'r	$105 00
" " " " clerk	31 04
" " " " auctioneer's fee	18 75
" " C. K. Mallory, com's and fee	31 00
" " T. Tabb, att'y, com's	15 50
" " G. M. Peek, " "	31 00
" " Jas. E. Turner's per. rep.	15 50
" " advertising, &c.	30 25
Balance in hands of com'r	4 85
	$282 89

Receipts for the above payments have been filed with the papers in these causes. The bonds taken by your com'rs for the deferred payments are returned and filed with this report.

Your com'rs also sold the interest of Thomas Latimer and John Latimer in a certain tract of 15 acres, bounded by Bates, Cumming, &c., and W. Daniel became the purchaser at the sum of two hundred and twenty dollars, but has not yet complied with the terms of sale and desires time to do so.

Your commissioners recommend the confirmation of the contracts entered into between P. West and G. B. West and A. J. Ford.

NOTE.—Lot No. 2, of which G. M. Peek became the pur-
105 chaser, was sold by your commissioners free of encumbrance, but it has since been ascertained that the land is subject to the wife's contingent right of dower, and that — willingness to have the same commuted, and the said G. M. Peek has expressed his willingness to pay such amount as the court may deem proper, to be credited on his bonds. This special statement is made by your com'rs, C. K. Mallory and Thomas Tabb; and your said com'rs also state that there is a considerable amount due the State and county for taxes, which is a prior lien on said lot, and the same is true with reference to other lots sold above.

G. M. PEEK.
CHAS. K. MALLORY.
THOMAS TABB.

Statement of Account of Special Com'rs Filed in the Consolidated Causes of Brinkley, &c., vs. Latimer, West, &c.; Latimer vs. Willis &c., and Peek vs. West, &c.

Bal. due com'rs on commissions for sale of West lots in Hampton	$18 78
Commissions on $5,000.00, sale to Ford	109 00
" " $1,200.00, " " West	33 00
	$160 78

Decree. Nov. 15th, 1871.

BRINKLEY and WHITING *et al.*
vs.
LATIMER, WEST, *et al.*

WILLIS and *ux.*
vs.
LATIMER *et als.*

PEEK
vs.
WEST and WEST.

} In Chancery.

These causes came on this day again to be heard upon the papers formerly read and on the report of Special Commissioners C. K. Mallory, Thomas Tabb, and G. M. Peek, to which report no exceptions have been filed, and was argued by counsel.

On consideration whereof the court doth confirm the said report, and the court doth A., O., and D. that one of the commissioners of this court take an account of liens upon the lots of land sold by the said special com'rs and mentioned in the report aforesaid due
106 the Commonwealth of Virginia and the county of Elizabeth — on account of taxes and county levies which were due and unpaid on the 22d day of June, 1871, and upon the payment by the purchasers of said lots of the said taxes and county levies the same shall be credited in their bonds given for the purchase-money and filed in the papers in these causes, and upon the payment by the purchaser of lot No. 2, mentioned in said report, to Elizabeth, the wife of Thomas Latimer, of the sum of twenty dollars, which she consents to receive in commutation of her contingent right of dower in the said lot, the same shall be credited on his bonds given for the purchase of the said lot.

And the court doth further adjudge, order, and decree that the contracts of sale made by the defendant, Parker West, with A. J. Ford and G. B. West, which are referred to in a decree rendered in these causes on the 4th day of May, 1871, be, and the same are hereby, confirmed; and the special com'rs, C. K. Mallory, Thomas Tabb, and G. M. Peek, are directed to execute said decree rendered at the May term, 1871, in the sale of the said Newport News tract under the provisions of the said decree as to that part of said tract remaining unsold.

And the said special commissioners are authorized to draw from the funds of these causes deposited in the Citizens' Bank of Norfolk the sum of one hundred and sixty dollars and seventy-eight cents, due them for commissions on sales made under a former decree in these causes and on sales confirmed by this decree, account of which said commissions is filed in the papers of these causes.

And the court doth further adjudge, order, and decree that one of the commissioners of this court enquire into the title of a certain lot of land situate in Hampton, county of Elizabeth City, and bounded by South Back street and the lots of Wilson and Massenburg, and report to this court.

Decree. May 4th, 1872.

BRINKLEY, &c.,
vs.
LATIMER, &c.

WILLIS, &c.,
vs.
LATIMER.

PEEK
vs.
WEST.

} In Chancery.

The death of Parker West being suggested, on the motion
107 of William P. Marrow and Mary E., his wife, Elizabeth R. West, George B. West, and M. Smith and Missouri, his wife—the said Mary E. Marrow, Elizabeth R. West, G. B. West, and Missouri Smith being the heirs-at-law of the said Parker West—to be made parties defendant to these causes, the said William P. Marrow and M. E., his wife, E. R. West, G. B. West, and M. Smith and Missouri, his wife, are hereby made parties defendant to these causes, with leave to file their answers.

This cause then, this day, again came on to be heard on the papers formerly read and on the report of Special Commissioners C. K. Mallory, Thomas Tabb, and G. M. Peek of the sales made by them under a former decree in these causes, to which report no exceptions have been filed, and was argued by counsel.

On consideration whereof the court doth adjudge, order, and decree that the said report and the sales reported therein be, and the same are hereby, confirmed.

And the court doth further adjudge, order, and decree that out of the fund deposited to the credit of these causes in the Citizens' Bank of Norfolk Chas. K. Mallory do check for the sum of one hundred and nine 66⅔ dollars, balance of the commission due them; that Geo. M. Peek check on the said fund for the sum of one hundred and twenty-nine 66⅔ dollars, being the amount of commissions now due to each of them as special commissioners on sales reported at this term.

That George M. Peek do check for the further sum of two hundred dollars, being the amount allowed to the said G. M. Peek by the heirs of the said Parker West, as appears by written consent of counsel, for extra services rendered in the sales of said land, said amount of sales being in excess of debts due by Parker West, deceased, and reported in the third of these causes.

That Thomas Tabb check for the further sum of forty dollars for expenses incurred.

That Wm. Ivy check on said fund for the sum of forty-five dollars, the balance due him for surveying and laying off said land.

And the court doth further adjudge, order, and decree that the purchasers whose purchases have been confirmed under this and previous decrees in these causes do deposit to the credit of these causes the amount of their respective bonds, as they fall due, in the Citizens' Bank of Norfolk on the savings side thereof, and on the filing of said certificates of deposit in the papers in these causes the clerk of this court is authorized to deliver to said parties their respective bonds duly cancelled, and all other matters are reserved.

108 *Report of Special Com'rs. May 1st*, 1872.

BRINKLEY and WHITING
vs.
LATIMER, WEST, &c.

WILLIS and *ux.*
vs.
LATIMER, &c.

PEEK
vs.
WEST, &c.

} In Chancery.

To the Hon. George T. Garrison, judge of the circuit court of Elizabeth City county:

The undersigned, special com'rs appointed by the court in a decree rendered in the aforesaid consolidated chancery causes pending in said court, would respectfully report to your honor—

That in obedience to two decrees rendered in the said consolidated causes at the May term and November special term, 1871, of said court they have advertised and have sold by private sale the balance of the "Newport News tract" mentioned and described in the proceeding in the last of said causes; that they sold the balance of the said tract in lots and parcels, running back from the river front to the rear line of what is known as the "Newport's News tract;" and the said balance, including the 60 acres already sold to Ford and the 12 acres sold to West (which sales were confirmed at the last term of said court), is all the land included between Newport News creek and the Burke line, fronting on James river. The said land was so laid off by the surveyor, under the direction of your com'rs, as that each parcel should have an extent of river front to

bear the same ratio to the whole extent of front of the said balance (with the exception of 3 acres sold G. B. West) as the number of acres in the parcel would bear to the number of acres in the said balance remaining unsold at the last term of the court.

Your com'rs return with this report a plat of the balance of the said "Newport News tract," including the parcels sold to G. B. West and A. J. Ford. Said plat is marked Ex. "X," to which reference will hereafter be made.

1st. The lot heretofore sold to G. B. West, together with 3 acres sold by your com'rs to the said West on the 1st day of January, 1872, making 15 acres, is designated on said plat as "lot No. 1."

109 The three acres sold as aforesaid were so laid off from the balance of the said tract as to be included between a line run from the northeast corner of the lot of 12 acres heretofore sold to the said West straight to the river so as to make 3 acres. The estate of Parker West is indebted to S. B. Watson, dec'd, in the sum of $1,000, with interest from the 1st day of January, 1867. Said debt is reported by Com'r Howard among the special liens on the estate of Parker West, class No. 2, bond 4, and is, among other claims, the first lien on "Newport's News," the land sold by your com'rs. Said S. B. Watson by her will bequeathed the said bond to the said G. B. West. Your com'rs therefore received the debt in part payment of the tract of land, which is thereby paid and cancelled, and have taken the bond of G. B. West in the sum of two hundred dollars, the balance due payable in three years, with interest from date.

2d. On the 9th day of December, A. D. 1871, your com'rs sold to H. C. Whiting, L. H. Sclater, J. P. Hope, and M. A. Shield forty acres of the said tract remaining unsold, to be cut off next to the tract sold to G. B. West, for the sum of one hundred dollars an acre; and your com'rs required of the said purchasers the sum of two hundred dollars in cash and their joint and several bonds for the balance of the purchase-money, in equal installments, payable in one, two, three, and four years from date, with interest from date, which said cash and bonds your com'rs have received. The said 40 acres were laid off with a river front in due proportion with the whole tract remaining unsold and is designated on said plat as lot No. 2.

3d. On the 30th day of January, 1872, they sold to Maria S. Marrow, the wife of D. G. Marrow, to be held by her for her sole and separate use, free from the demands of her present husband or any other husband she may have, five acres of the said "Newport's News tract," and received from her the sum of twenty-five dollars in cash and the four bonds of D. G. Marrow and G. M. Peek, his security, each in the sum of $118.75, payable to your com'rs in one, two, three, and four years, with interest from date, for the purchase-money for said 5 acres, and the five acres so sold to M. S. Marrow aforesaid comprise the western half of the lot designated on the said tract as lot No. 7, divided by a line running through the centre of said lot No. 7, commencing at the river front and terminating on the rear line, Wm. K. Tabb having afterwards purchased the remaining half of said lot.

4th. On the first day of February, 1872, they sold to Wm. K. Tabb the eastern half of the lot last aforesaid, containing 5 acres, for $100 per acre, and received from him the sum of twenty-five dollars in cash and his four bonds, executed by himself and
110 Thomas Tabb, his security, each in the sum of $118.75 and payable to your com'rs in one, two, three, and four years, with interest from date, for the deferred payment of the purchase-money.

5th. On the same day last aforesaid they sold to Mrs. Malvina Elliott "lot No. 3" on said plat, containing 15 acres, for the sum of fifteen hundred dollars, and they received from her the sum of seventy-five dollars in cash and *his* four bonds, with Thomas Tabb, her security, payable in one, two, three, and four years, with interest from the day of sale, for the deferred installment of the purchase-money.

6th. On the first day of April, 1872, they sold to H. Phoebus, Jos. G. Fulton, and Wm. H. Kimberly two lots of the said tract, designated on said plat as "lot No. 4," containing 12 acres, and lot No. 6, containing 12 acres, making a total of twenty-four acres, for the sum of two thousand four hundred dollars, and your com'rs received of the said Phoebus, Fulton, and Kimberly the sum of one hundred and twenty dollars in cash and their four joint and several bonds, each in the sum of $570, payable to your com'rs in one, two, three, and four years, with interest from date, for the deferred payments.

7th. On the same day last mentioned they sold to James A. Watkins the lot designated on the said plat as "lot No. 5," which contains 12 acres and is located between lots No. 4 and 6, which were sold to Phoebus, Fulton, and Kimberly, for the sum of $100 per acre, and they received of the said James A. Watkins the sum of sixty dollars in cash and his four bonds, with W. P. Reynolds, his security, each in the sum of $285, payable in one, two, three, and four years, with interest from date for the deferred installments of the purchase-money.

9th. On the same day they sold to T. S. Tennis, T. S. Tennis & Co., Tennis & Gatewood, George Schermerhorn, John Saunders, Jerome Tilton, Samuel J. White, and Wm. S. Howard the lot designated on the said plat as lot No. 9, containing 40 acres, and they received from the said parties the sum of two hundred dollars in cash and their four joint and several bonds, each in the sum of $950, payable to your commissioners in one, two, three, and four years, with interest from date for the deferred payments. One-tenth interest in the said purchase—that part represented by Samuel J. White—was sold, to be held for the sole and separate use of the wife of the said Samuel J. White.

10th. On the first day of December, 1871, they sold to A. J. Ford a parcel of ten acres of the said land in addition to the lot of fifty acres before that time purchased by him, which purchase was confirmed by the court at its last term. The said additional ten
111 acres was sold to the said Ford at the sum of one thousand dollars, and, together with the 50 acres heretofore sold to said

Ford, marked "lot No. 10," Ivy's plat, containing 60 acres, and bounded by Newport's News creek, the lot of Tennis and others, and James river. For the said purchase your commissioners have received from the said A. J. Ford the sum of five hundred dollars in cash and his four bonds, executed by him and Wm. A. Yerby, his security, each in the sum of one thousand three hundred and seventy-five dollars, payable to your commissioners in one, two, three, and four years, with interest from date for the deferred installments of the purchase-money.

And your com'rs further report that the aforesaid sales comprise all the land contained in the tract called "Newport's News," with the exception of "lot No. 8," not yet sold; that the sales aforesaid were made subject to the approval of the court; that they believe the price paid or agreed to be paid for the said land—to wit, ($100) one hundred dollars per acre—a good price, and is double the assessed value of said land by the last assessment made for taxation in the county of Elizabeth City; that the parties to whom the sales are made are in every instance responsible parties, so far as your com'rs can judge, and that the bonds taken for the deferred installments of the purchase-money are good and solvent; that they employed a competent surveyor to assist in laying off and dividing the said land into parcels, and recommend to the court that he be paid the sum of $60, which they consider a reasonable compensation for his services.

In the paper marked "A" and filed with this report your com'rs present a statement of their operations since the last decree entered in the aforesaid causes, which is a more condensed report of their sales since the last decree. All the cash which has been received by your commissioners in the various sales they have made and herein reported they have deposited in the Citizens' Bank of Norfolk to the credit of these causes, and the certificates of deposit are filed in the papers in said causes.

In statement "A" your com'rs also show the amount due them for commissions on the sales made and the sum they have reported as due the surveyor for his services in the premises.

Your com'rs further report that the proceeds of the sales herein reported, with those of the former sales to West and Ford, will be sufficient, with the sale of "lot No. 8," to pay the debts of the said Parker West. As a part of the costs of this suit your commissioners, C. K. Mallory and T. Tabb, would report the sum of two hundred dollars as a proper charge by G. M. Peek for extra services in
112 making the said sales; and your com'rs, C. K. Mallory and G. M. Peek, report the sum of forty dollars due Thomas Tabb for expenses incurred in going to the city of New York to effect a sale of the said land to the Chesapeake and Ohio R. R.

CHAS. K. MALLORY,
THOMAS TABB,
G. M. PEEK,
Special Com'rs.

"A."

Statement Showing the Lots Sold and the Names of the Purchasers, the Am't of Cash Received in Each Case, and What Disposition Made Thereof, &c.

No. of lot.	Names of purch'rs.	No. of acres.	Am't of purchase.	Cash received.
Lot No. 1	Geo. B. West	15	1,500 00	
" " 2	Whiting and others	40	4,000 00	200 00
" " 3	Mrs. M. Elliott	15	1,500 00	75 00
" " 4	Kimberly, F., and Phœbus	12	1,200 00	60 00
" " 5	James A. Watkins	12	1,200 00	60 00
" " 6	Kimberly, F., and Phœbus	12	1,200 00	60 00
" " 7	W. K. Tabb and M. S. Marrow	10	1,000 00	50 00
" " 9	Tennis and others	40	4,000 00	200 00
" " 10	A. J. Ford	60	6,000 00	500 00
	Total	216	$21,600 00	$1,205 00

Am't of cash received		$1,205 00
Am't rec'd in certificates of deposit for the parties	$880 00	
Am't deposited in the Citizens' Bank and cert. filed in papers	288 35	
Am't paid for collecting Ford's	161 65	
Cash paid C. K. Mallory, part of his com's	20 00	
Paid Wm. Ivy, survey., in part for services	15 00	
Total	$1,205 00	$1,205 00
Am't deposited in bank to the credit causes up to May 1st, 1872		$1,168 35
Am't drawn out		160 78
Balance in bank		$1,007 57

113 *Statement of Commissions and Costs Due in These Suits to the Present Time.*

Commissions.

Lot No. 1. Com'ns on $300 @ 5 per cent. and on $— @ 2 per cent.	15 00
Lot No. 2. Com'ns on $300 @ 5 per cent. and on $3,700 @ 2 per cent.	89 00
Lot No. 3. Com'ns on $300 @ 5 per cent. and on $1,200 @ 2 per cent.	39 00

Lots Nos. 4 and 6. Com'ns on $300 @ 5 per cent. and on $2,100 @ 2 per cent.		57 00
Lot No. 5. Com'ns on $300 @ 5 per cent. and on $900 @ 2 per cent.		33 00
Lot No. 7. Com'ns on $300 @ 5 per cent. and on $200 @ 2 per cent.		19 00
Lot No. 7. Com'ns on $300 @ 5 per cent. and on $200 @ 2 per cent.		19 00
Lot No. 9. Com'ns on $300 @ 5 per cent. and on $3,700 @ 2 per cent.		89 00
Lot No. 10. Com'ns on $300 @ 5 per cent. and on $700 @ 2 per cent.		29 00
Total commissions		$389 00
To Thomas Tabb	$129 66⅔	
To C. K. Mallory	129 66⅔	
To G. M. Peek	129 66⅔	
Total		$389 00
To Wm. Ivy, surveyor, $45 and $15	$60 00	
To Thomas Tabb, expenses	40 00	
To G. M. Peek, extra services	200 00	
		300 00
Total		$689 00
		$1,007 57
To be drawn		654 00
Balance in bank		$353 57

114 *Report of Special Com'rs. Oct. 1st,* 1872.

In the Circuit Court of Elizabeth City County. In Chancery.

BRINKLEY, WHITING, &c., *vs.* LATIMER, WEST, &c.

WILLIS and *ux. vs.* LATIMER.

PEEK *vs.* WEST and WEST.

To the Hon. Geo. T. Garrison, judge of the said court:

The undersigned, special commissioners, appointed by decree in the aforesaid consolidated suits and directed at the last term of said court to make sale of the lot of the Newport News tract remaining unsold, report to the said court that we have effected a sale of the said lot, which is lot No. 8 in Ivy's plat, to John S. Tucker and John B. Whitehead, of the city of Norfolk, at the sum of two thousand and fifty dollars, which is at the rate of $100 per acre, said lot No. 8 con-

taining 20½ acres; that your commissioners received of the said purchasers the sum of $150 in cash and their four bonds, each in the sum of $475, with interest from date, and dated on the 1st day of July, 1872, the day of sale, payable to your commissioners in one, two, three, and four years, respectively. Your commissioners further report that they have filed a certificate of deposit made by the said purchasers in the Citizens' Bank of Norfolk in the sum of one hundred and fifty dollars and the bonds aforesaid in the papers in said suits with this report.

Respectfully submitted.

CHAS. K. MALLORY,
THOMAS TABB,
G. M. PEEK,
Special Com'rs.

115 *Decree. Oct. 2d*, 1872.

BRINKLEY and WHITING
vs.
LATIMER, WEST, &c.

WILLIS and *ux.*
vs.
LATIMER.

PEEK
vs.
WEST, &c.

} In Chancery.

These causes came on this day again to be heard upon the papers formerly read and upon the report of Special Com'rs Chas. K. Mallory, Thomas Tabb, and G. M. Peek of the sale made by them of the lot No. 8, containing 20½ acres, of the Newport News tract, to John S. Tucker and John B. Whitehead, to which report no exceptions have been filed, and was argued by counsel.

On consideration whereof the court doth confirm the said report of sale, and doth further order, adjudge, and decree that the Citizens' Bank of Norfolk, out of the amounts deposited therein to the credit of these causes, pay to Chas. K. Mallory the sum of eighteen dollars and thirty-three cents, and to Geo. M. Peek the like sum of eighteen dollars and thirty-three cents; to Thomas Tabb the sum of eighteen dollars and thirty-three cents, the amount of their commissions for the sale of the said lot No. 8, and the fee of five dollars for the deed hereafter directed to be given; to Martin McDevitt, treasurer of Elizabeth City county, the sum of two hundred and fifty-four dollars and seventy-one cents, the amount of county, State, and school tax due on the said Newport News tract for the year 1871.

And the court doth further adjudge, order, and decree that the said Citizens' Bank, out of the deposits therein made and to be made, after paying the amount hereinbefore directed to be paid, do pay,

first, to Chas. K. Mallory, attorney for J. B. Brinkley, the sum of seven hundred and forty-one $\frac{49}{100}$ dollars ($741.49), with interest on four hundred dollars, part thereof, from the 1st day of May, 1871; second, to Charles K. Mallory, attorney for M. L. Lake, assignee of A. B. McLean, eleven hundred and forty four $\frac{88}{100}$ dollars ($1,144.88), with interest on six hundred and seventy-five dollars, part thereof, from the 1st day of May, 1871; third, to Chas. K. Mallory, attorney
116 for J. W. Whitehurst & Co., thirteen hundred and forty $\frac{6}{100}$ dollars ($1,340.06), with interest on eight hundred and thirty-three dollars and sixty-six cents, part thereof, from the first day of May, 1871; fourth, to Chas. K. Mallory, attorney for J. W. Whitehurst, three hundred and seventy-eight dollars and twenty-eight cents ($378.28), with interest on two hundred and thirty-two $\frac{72}{100}$ dollars, part thereof, from May 1, 1871; fifth, to Thomas Tabb, attorney for Virginia Cooper, assignee of James Phillips, adm'r, one hundred and seventy-five $\frac{98}{100}$ dollars, with interest on one hundred dollars, part thereof, from the first day of May, 1871; sixth, to Thomas Tabb, attorney for L. Garrow, adm'x, two hundred and fifty-seven $\frac{56}{100}$ dollars, with interest on one hundred and thirty dollars from the 1st day of May, 1871; seventh, to Thomas Tabb, attorney for John Wray, adm'r, one hundred and twenty-nine $\frac{46}{100}$ dollars, with interest on $75, part thereof, from May 1, 1871; eighth, to Chas. K. Mallory, attorney for Edward King, assignee, three hundred and thirty-one $\frac{80}{100}$ dollars, with interest on two hundred dollars, part thereof, from May 1st, 1871; ninth, to Wm. S. Howard and T. M. Joynes twelve hundred and forty-six dollars and seventy-four cents, with legal interest on $739.47, part thereof, from May 1, 1871; tenth, to Geo. S. West or to C. K. Mallory, his attorney, seven hundred and eight dollars and forty-one cents, with interest thereon from May 1, 1871; the said several sums to be paid by the said Citizens' Bank out of said deposits upon presentation of the checks of G. M. Peek, one of the said special com'rs, and said Com'r Peek is directed to draw his checks in favor of the said creditors in the order in which they are named in this decree, taking care in no case to exceed the amount deposited.

And it appearing that G. M. Peek has paid the bonds given by him, with Wm. J. Stores as security, for the purchase of lot No. 2 in the report of said Com'rs Mallory, Tabb, and Peek of June 22d, 1871, of the sale of the town lots in Hampton, decreed to be sold in these causes, and requested by his writing filed in the papers in these causes that the said lot may be conveyed to J. J. Barnes, of Elizabeth City county, the court doth direct the said Com'rs Mallory, Tabb, and Peek, to execute and deliver to the said J. J. Barnes a deed, with special warranty, for the said lot.

And the purchaser of the lots and parcels of land heretofore sold are at liberty to anticipate the payment of their bonds given for the purchase-money by depositing the same to the credit of these causes and subject to this and the future order of the court in the Citizens' Bank of Norfolk and filing certificates of such deposits in the papers of these causes, and when the whole of the purchase-money
117 has been so paid by any purchaser the said commissioners are

directed to execute and deliver to him a deed, with special warranty, for the property purchased.

(Pages 215 and 216 of MS. record omitted.)

Decree. May 3d, 1873.

BRINKLEY, &c.,
vs.
LATIMER, &c.

WILLIS and *ux.*
vs.
LATIMER, &c.

PEEK
vs.
WEST.

} In Chancery.

These causes came on this day to be again heard on the papers formerly read and on the report of Special Com'r G. M. Peek of payments made to the creditors in these causes, to which report no exceptions have been filed, and was argued by counsel.

On consideration whereof the court doth confirm said report, and the court doth further adjudge, order, and decree that G. M. Peek, as special com'r, continue to check on the fund deposited to the credit of these causes in the Citizens' Bank, Norfolk, as directed by the decree in these causes entered at the October term, 1872; and the court doth further direct the said G. M. Peek to check on the fund so deposited for the sum of fifty dollars, his fee for disbursements heretofore made to creditors in these causes, and the said G. M. Peek will check on the said fund for the further sum of ten dollars to pay the costs heretofore incurred and to be incurred in these causes.

Report of Payments to Creditors. March 20th, 1874.

To the Hon. George T. Garrison, judge of the circuit court of Elizabeth City county:

In obedience to a decree rendered in the consolidated causes of Brinkley, &c., *vs.* Latimer, &c.; Willis and *ux. vs.* Latimer, &c., and Peek *vs.* West, &c., at the October term, 1872, directing the undersigned, as special com'r, to check on the fund deposited in
118 the Citizens' Bank of Norfolk to the credit of said causes for the payment of certain debts due parties in said decree named, your com'r begs respectfully to report that he has checked on the said fund to the full amount of all the claims directed to be paid in said decree; and, in addition to his report of May 1, 1873, he reports the following sums paid:

1873.		
Aug. 20.	Checked in favor of Wm. S. Howard and T. M. Joynes	$665 00
Feb. 11.	Checked in favor of C. K. Mallory, att'y — Geo. S. West (in full)	839 93
" 13.	Checked in favor of Wm. S. Howard and T. M. Joynes (in full)	415 64
	Total	$1,920 57

Very respectfully submitted.

G. M. PEEK,
Special Com'r.

Report of Payments Made to Creditors. October, 1874.

To the Hon. Geo. T. Garrison, judge of the circuit court of Elizabeth City county:

In obedience to a decree rendered in the consolidated chancery causes of Brinkley, &c., *vs.* West, &c.; Willis, &c., *vs.* Latimer, &c., and Peek, &c., *vs.* West, &c., at the March term, 1874, directing the undersigned, as special com'r, to check on the fund deposited to the credit of the said causes in the Citizens' Bank of Norfolk for the payment of certain debts reported and stated in the said decree, your com'r begs to report that he has checked on the said fund for the following sums and in favor of the following parties:

1.	To Wm. Ward or G. M. Peek, his att'y, for claim secured by deed of trust (in full payment)	$593 33
2.	To Thomas Tabb, att'y for Thos. E. Milstead, per rep. of Wm. Lee, dec'd, in payment of a note due H. S. Institution	854 40
3.	To Thomas Tabb, att'y for Thos. E. Milstead, per rep. of Wm. Lee, dec'd, in payment of note of P. West to H. S. Institution	134 79
4.	To same in payment of another note due H. S. Institution	144 89
119 5.	To Thomas Tabb, assignee of C. K. Mallory, in payment of bond of P. West in favor of C. K. Mallory	177 00
6.	To Thomas Tabb, att'y for the Farmers' Bank of Virginia	1,076 02
7.	To G. M. Peek, com'r	19 20
8.	To E. W. Holt, cl'k	3 05
	Total	$3,002 68

The foregoing checks, with the exception of the three last, were for the payment of claims secured by deed of trust. No. 6 is in full of judgment against P. West and others in favor of the president and directors of the Farmers' Bank of Virginia.

Very respectfully submitted.

G. M. PEEK.

Com'r's Report of Taxes on Lots, Due 22d June, 1871. Filed Oct., 1874.

BRINKLEY and WHITING
vs.
LATIMER.

WILLIS and *ux.*
vs.
LATIMER.

PEEK
vs.
WEST, &c.

} In Chancery.

In obedience to a decree of this hon. court entered in the above-entitled causes on the 15th day of Nov., 1871, ordering your com'r to take an account of the liens upon the lots of land sold by the special com'rs in said causes and mentioned in their report of sale due to the Commonwealth of Virginia and the county of Elizabeth City on account of taxes and county levies which were due and unpaid on the 22d of June, 1871, your com'r reports as follows:

That on the lot of Thomas Latimer's heirs, bounded by King street, Whiting, and Chisman, there was $43.39 due, as per memorandum of county treasurer filed herewith, marked "A," and made a part of this report.

That on the three lots of Parker West, described in memorandum "B" of the county treasurer and herewith filed, there was
120 $6.09 due, and on the M. A. Willis lot, described in memorandum "C" of the county treasurerer, there was due $21.07; total, $70.55.

Your com'r files memoranda of county treasurer in support of this report.

Respectfully reported.

WM. S. HOWARD, *Com'r.*

Decree. Oct. 26th, 1874.

BRINKLEY, &c.,
vs.
LATIMER, &c.

WILLIS and *ux.*
vs.
LATIMER, &c.

PEEK
vs.
WEST, &c.

} In Chancery.

To the Hon. Geo. T. Garrison, judge of the circuit court of Elizabeth City county, Virginia:

These causes came on this day again to be heard together upon

the papers formerly read, upon the report of Special Com'r G. M. Peek of the payments made to creditors by order of the last decree entered in these causes, and the report of Com'r Howard of back taxes due on the lots heretofore sold, to which reports no exceptions have been filed, and *was* argued by counsel.

On consideration whereof the court, confirming said reports of Special Com'r Peek and Com'r Howard, doth adjudge, order, and decree that Chas. K. Mallory and Geo. Felton or some one for them be at liberty to deposit to the credit of these causes in the Citizens' Bank of Norfolk, Virginia, the balance due by them on their bonds executed for the deferred payments of the purchase-money for the two lots of land purchased by them under a former decree in these causes, and having made said deposit they will file the certificate thereof in the papers in these causes, and upon the filing of said certificate the clerk of this court will deliver to them their said bonds duly cancelled, and G. M. Peek, as special commissioner, will execute and deliver to each of the said parties deeds with special warranty for the respective lots purchased by them.

And the court doth further adjudge, order, and decree that
121 the Citizens' Bank of Norfolk do pay to Martin McDevitt, treasurer of Elizabeth City county, the sum of seventy dollars and fifty-five cents, which is the amount of taxes for the years 1868, 1869, 1870, and 1871 on the lots, as reported in Com'r Howard's report this day filed; and after the payment of the sums heretofore ordered to be paid the said Citizens' Bank will pay, 1st, to John D. Gordon & Co. or Scarburgh, Duffield & Sharp, their attorneys, the sum of three hundred and forty-nine dollars and ninety-three cents, with interest on two hundred and seventy-six dollars and sixty-six cents, a part thereof, from May 1st, 1871, till paid; 2d, to the Norfolk Savings Institution or Tazewell Taylor the sum of six hundred and fifty-five dollars and three cents, with interest on four hundred and two dollars and sixty cents, a part thereof, from the 1st day of May, 1871, till paid; 3d, to Thomas Tabb, attorney for Thomas Watts, Sr., the sum of thirty dollars, with interest thereon from Jan'y 1st, 1861, until paid; 4th, to A. C. Tabb, assignee of M. B. Smith, or S. Smith, his attorney, the sum of one thousand and five dollars and eighty-one cents, with interest on five hundred and sixty dollars and forty-three cents, a part thereof, from the 1st day of May, 1871, until paid; the said several sums to be paid by the said Citizens' Bank out of any fund deposited there to the credit of these causes upon the presentation of the checks of G. M. Peek, special com'r, and the said special com'r, Peek, is directed to draw his check in favor of the said creditors in the order in which they are named, but the said G. M. Peek is authorized to check upon the said fund so deposited for the sum of twenty-nine dollars, which is 1 per cent. commissions for disbursing funds since the last term of this court.

And the court doth direct one of the com'rs of this court to ascertain and report to the court the amount of the credit that should be given in the claim of M. B. Smith, which is claim No. 9 in account 4 of Com'r Howard's report.

And it is ordered that the commissioners of this court take an account of any further liabilities or demands against the estate of Parker West, deceased, not heretofore reported, but the parties presenting any claim under this order shall pay the costs and expenses thereby incurred.

The court doth reserve, &c.

122 *Decree. April 23rd*, 1875.

BRINKLEY, &c.,
vs.
LATIMER, &c.

PEEK, &c.,
vs.
WEST, &c.

WILLIS and WIFE
vs.
LATIMER, &c.

} In Chancery.

These causes came on this day to be again heard together upon the papers formerly read, and *was* argued by counsel.

On consideration whereof the court doth adjudge, order, and decree that they be recommitted to one of the com'rs of this court to ascertain what portion of the judgment of M. B. Smith *vs.* P. West and others, heretofore reported to and confirmed by the court, has been paid by other parties than the estate of P. West, and to report to the next term of the court the correct balance, with interest due on said judgment, together with any matter deemed pertinent by himself or specially required to be stated by any of the parties interested.

Decree. April 27th, 1875.

BRINKLEY, &c.,
vs.
LATIMER.

WILLIS and *ux.*
vs.
LATIMER.

PEEK
vs.
WEST, &c.

} In Chancery.

This cause this day again came on to be heard upon the papers formerly read, and was argued by counsel.

On consideration whereof the court doth adjudge, order, and decree that unless Jas. A. Watkins, Geo. Felton, Wm. K. Tabb, P. P. Davis, H. C. Whiting, Harrison Phoebus, L. Sheetz, T. S. Tennis, D. G. Marrow, John S. Tucker, Charles K. Mallory, and Malvina
123 Elliot shall, within sixty days of the service of a copy of this

decree upon them, deposit to the credit of this cause in the Citizens' Bank, Norfolk, the amount of their respective bonds, which are now due and unpaid, given for the purchase of certain parcels of the land in the bill and proceedings mentioned and described, then Chas. K. Mallory, G. M. Peek, and Thomas Tabb, as special com'rs, any two of whom are authorized to act, shall sell at public auction, at the cross-streets in the town of Hampton, the said lots or parcels of land purchased by the aforesaid parties, respectively, after thirty days' previous notice thereof by posters at three or more public places in the county of Elizabeth City and once a week for four successive weeks in some newspaper of the city of Norfolk, upon the following terms: One-third cash and the balance upon a credit of twelve and eighteen months, with interest from the day of sale, the purchaser to execute his bond with sufficient surety, and the title to be retained until the further order of the court, the cash payments to be made by said purchasers to be deposited by them to the credit of this cause in the Citizens' Bank, Norfolk, and the certificates of said deposit to be filed with the papers in this cause.

Report of Com'r Peek. July 25th, 1875.

To the Hon. Ro. L. Montague, judge of the circuit court of Elizabeth City county:

The undersigned, one of the com'rs of chancery for the said court, respectfully reports, in obedience to a decree rendered in the consolidated causes of Brinkley and Whiting *vs.* Latimer, West, &c., Willis and *ux. vs.* Latimer, and Peek *vs.* West at the last term, that after giving the required notice he made the account therein directed and now returns statement marked "A" as a true statement thereof. These two claims are reported in Com'r Howard's report, in the 4th and 5th liens.

Very respectfully submitted. G. M. PEEK,
Fee, $3.00. *Commissioner.*

An Account of the Claim of M. B. Smith against Parker West, Deceased, Reported in Com'r Howard's Report, Account 4, No. 9. Reported by Sydney Smith, Att'y.

124	1. Judgment, M. B. Smith *vs.* Wm. Ivy, Parker West, and Wm. P. Marrow, for $318.25, with interest from May 13th, 1856, to May 1, 1871	$318 00	
	Dec., 1869, rec'd $350.		
	Add interest to Dec., 1869	236 91	
	And costs	8 50	
	Total Dec., 1869	$563 41	
	Deduct payment	350 00	
		$213 41	
	Int. on bal. from Dec., 1869, to May 1, 1871	18 13	
			$231 54

The above, with others, is the fourth lien.

2. M. B. Smith, assignee C. K. Mallory, *vs.* William P. Marrow and Parker West:

Judgment for	112 50	
Int. from Jan'y 1, 1860, to May 1, 1871	76 50	
Costs	8 30	
	$197 30	
The last named, among others, constitutes the fifth lien.		
Deduct 4 years' war int.	103 32	
		93 98

Decree. August 9th, 1875.

BRINKLEY and WHITING *vs.* LATIMER, WEST, &c.

WILLIS and *ux.* *vs.* LATIMER.

PEEK *vs.* WEST, &c.

} In Chancery.

These causes came on this day again to be heard upon the papers formerly read and upon the report of Com'r Peek of the accounts directed to be taken by the last decree in these causes, to
125 which report no exceptions have been filed, and *was* argued by counsel.

On consideration whereof the court doth confirm the said report of Com'r Peek; and the court doth further adjudge, order, and decree that the Citizens' Bank of Norfolk do pay to M. B. Smith or Sydney Smith, his attorney, the sum of two hundred and thirty-one dollars and fifty-four cents, with interest on two hundred and thirteen dollars and forty-one cents, a part thereof, from May 1st, 1871, until paid, the said sum to be paid by the said bank out of any funds therein deposited to the credit of these causes upon presentation of the check of Special Com'r G. M. Peek without regard to the order in which it has been decreed to be paid.

And it appearing to the court that Leonard Sheetz, the purchaser of lot No. 3, situate in Hampton, on Queen street, and bounded by the lots of Tennis and Ham, the creek, and the said street, has paid the whole of the purchase-money for said lot, with all the interest due thereon, the court doth adjudge, order, and decree that G. M. Peek, as special com'r, execute and deliver to the said Leonard Sheetz a deed with special warranty for the said lot of land.

And the court doth further adjudge, order, and decree that the said Citizens' Bank pay to Wm. P. Marrow or Thomas Tabb, his attorney, the sum of sixty-eight dollars and thirty cents, with inter-

est thereon from December 1, 1869, until paid, and to G. M. Peek, com'r, the sum of eight dollars, his fee as commissions and for preparing the deed herein directed.

And the court doth further adjudge, order, and decree that the clerk of this court deliver to Thomas Tabb, special com'r, all the purchase-money bonds which are now due for the purchase of lots and tracts of land heretofore sold under decrees in these causes for collection, by suit or otherwise, the proceeds of such collection to be deposited by him to the credit of this cause in the Citizens' Bank of Norfolk, and the said special com'r, Thomas Tabb, will make report of his transactions to the court at its next term; but before the clerk shall deliver the said bonds as aforesaid the said Thomas Tabb shall execute his bond before him in the sum of four thousand dollars, with sufficient security, to be approved by him, and payable and conditioned according to law.

Report of Sp'l Com'r Tabb. Oct. 26th, 1875.

To the Hon. Robert L. Montague, judge:

The undersigned, sp'l com'r to collect the unpaid purchase bonds, would respectfully report that he has seen most of the par-
126 ties indebted; that Mr. James S. Darling has deposited to the credit of this cause in the Citizens' Bank, Norfolk, the sum of $1,280.42; that Messrs. Tucker and Whitehead have deposited the sum of $1,133.66, and filed the certificates of said deposits with the papers in this cause. None of this money passed through the hands of your commissioner.

Respectfully submitted.

THOMAS TABB.

(Pages 237, 238, 239, 240, and 241 of MS. record omitted.)

Decree. April 26th, 1876.

BRINKLEY, &c.,
vs.
LATIMER, &c.

WILLIS, &c.,
vs.
LATIMER.

PEEK
vs.
WEST, &c.

} In Chancery.

These causes came on this day again to be heard together upon the papers formerly read, upon the suggestion of the death of Chas. K. Mallory, one of the com'rs appointed by the court in these causes, and *was* argued by counsel.

On consideration whereof the court doth adjudge, order, and de-

cree that the surviving special com'rs, Thomas Tabb and G. M. Peek, heretofore appointed by the court convey by deeds with special warranty to the purchasers of the lots of land and of the lands sold under decrees in these causes when such purchaser or purchasers shall have paid the whole of the purchase-money bonds executed by them for the purchase of the said lands as heretofore directed by decree in these causes.

(Pages 244, 245, 246, and 247 of MS. record omitted.)

Office of G. M. Peek, sp'l com'r of the cir. c't of Eliz. City county.

OCT. 24TH, 1878.

To the Hon. Ro. L. Montague, judge of the circuit court of Elizabeth City county:

The undersigned, special com'r appointed by decree in the
127 suits of Brinkley and Whiting *vs.* West, Latimer, &c., Willis and *ux. vs.* Latimer, and Peek *vs.* West and West, would respectfully report the payments made to creditors by him under decrees in said consolidated causes.

Your com'r has from time to time made similar reports, but in this report he has consolidated all former reports, and, having been requested by parties interested, he has calculated the amounts respectively due by purchasers of parcels and lots of land on their respective purchases, the debts still unpaid, and has specially stated the transactions between Parker West and the adm'r of Wm. Lee with reference to the purchasers of the deposits of Wm. Lee in the Hampton Savings Institution to pay off the judgments recovered against Parker West as principal and as security for others, and reported in these causes:

1. Your com'r reports in account 1, herewith returned, what debts have been paid.

2. Account 2, herewith returned, contains a statement of debts reported which have not been paid. They amount in the aggregate sum of $3,021.77.

The debt due to Wm. Lee's estate is substituted for the judgments in favor of the Hampton Savings Institution, as that is the balance of the amount due Wm. Lee's estate, which was — in checks on said institution, which paid off said judgments, and the estate of Wm. Lee is substituted in the place of said institution to the amount of said balance, to wit, $713 (3), reported in account 3, and 10 per cent. per annum is allowed and reported on said sum of $713 by special contract between the heirs of P. West and the adm'r of Wm. Lee, the law at that time authorizing the same.

4. A statement of a claim *vs.* P. West as security on the fiduciary bond of Wm. Ivy, as adm'r of Thomas Skinner, is made in account 4. The amount of P. West's indebtedness as said security has never been reported in this cause, nor has the same been ascertained, but your commissioner simply states the proper amount which will or may be proved against him, and he has taken the same from the suit of Skinner and Gill *vs.* Ivy, &c.

5. In account 5 will be found the respective am'ts due by purchasers on their bonds, which greatly exceeds the debts unpaid.

All of which is respectfully submitted.

G. M. PEEK, *Sp'l Com'r.*

Fee, $50.

(Pages 249, 250, 251, 252, 253, 254, and 255 of MS. record omitted.)

128 3. *Statement of Account Between the Estate of P. West, Dec'd, and the Estate of Wm. Lee, Dec'd.*

Up to April 19th, 1872, the Hampton Savings Institution had recovered of P. West, as principal and security for others, judgments to the aggregate amount of $3,859.00, as will appear from the report of Wm. S. Howard, com'r in these causes. The above sum includes some notes to the H. S. Institution, in which P. West was principal, which he secured by deed of trust. P. West's heirs at the time stated purchased on time, at 10 per cent. interest, of the personal representative of Wm. Lee a sufficient amount of the deposit in said bank due to Wm. Lee as would, at 40c. on the dollar, make the above amount, and with that deposit paid off the said claims, the affairs of said bank being about to be placed in the hands of a receiver. The amount so purchased was $1,543.60. In April, 1874, T. Tabb, att'y for T. E. Milstead, per. rep. of Wm. Lee, dec'd, drew in these causes as follows:

April 7	$134 79
" "	144 89
" "	854 40
	$1,134 08
	$1,543 60
Add interest at 10 per cent. on $1,543.60 to April, 1874	303 56
	$1,847 16
	1,134 08
Bal of prin. due Wm. Lee's estate	$713 08

With int. from April 7th, 1874, at 10 per cent.

4. *An Account of Further Liabilities Against the Estate of P. West Dec'd, which have not been Reported in these Causes.*

1. The estate of Parker West is liable for the sum of $443.08, with int. from Feb'y, 1865, until paid, by reason of the said P. West's having become the security of Wm. Ivy as personal representative of Sarah Skinner. (See suit Gill and *ux. vs.* Ivy and West.) This is not reported, but simply noted to be proved by the parties.

Principal	$443 08	
Int. to Oct. 20, 1878	363 32	
		$806 40

129 5. An account of the balance due by the purchasers of lots and tracts of land under decrees in these causes upon the bonds given for the purchase-money.

1. P. P. Davis and Louis Davis, his security, owe the whole of their four bonds, each in the sum of $12.50, aggregating	50 00	
Interest from June 22d, 1871	22 00	
Total to Oct. 3d, 1878		72 00
2. H. C. Whiting and Kennon Whiting, his security, owe the whole of their bonds executed for the purchase of the lot on South Back street, four bonds, each in the sum of $15	60 00	
Int. from June 22, 1871, to Oct. 20, 1878	26 40	
		86 40
3. Geo. Felton and C. K. Mallory, his security, owe the whole of their four bonds, each in the sum of $23.56, for the purchase of a lot on S. Back street	94 25	
Int. from June 22, 1871, to Oct. 20, 1878	41 47	
		135 72
4. Chas. K. Mallory and W. S. Howard, his security, owe a balance as follows: In their bonds for the purchase of the lot at the intersection of Main and Queen and S. Back streets:		
Total bonds $430 00		
Int. June 22, '71, to Nov. 21, '73 62 35		
492 35		
Paid Nov. 21, 1873 300 00		
Bal. due Nov. 21, 1873	192 35	
Int. to Oct. 20, 1878	57 70	
		250 05
5. Daniel Cumming purchased a tract of 15 acres, but it was afterwards ascertained that it was the land of Mr. G. M. Bates.		
(Balance on Newport's News.)		
6. Due by Geo. B. West on his bond for the bal due on his purchase, principal	200 00	
Int. from Jan'y 1, 1872, to Oct. 20, 1878	80 00	
		280 00

130 7. Due by A. J. Ford on his purchase of lot No. 10, of 60 acres, his last purchase-money bond 1,375 00
Int. from Dec. 1, 1871, to Oct. 20, 1878.. 563 75 1,938 75

8. H. C. Whiting, L. H. Sclater, J. P. Hope, and M. A. Shield owe on their bonds for the purchase of lot No. 2, containing 40 acres, as follows:
Two bonds, each in the sum of $950.... 1,900 00
Int. from Dec. 9, 1871, to Oct. 20, 1878.. 779 00
2,679 00
One-eighth of one of these bonds has been paid by J. S. Darling (Oct. 25, 1875).. 167 44 2,511 56

M. A. Shield is dead and a suit is instituted by special com'rs *vs.* his estate to subject his interest.

9. Daniel G. Marrow and G. M. Peek, his security, owe on his purchase, one-half lot No. 7, of 5 acres, two bonds, each in the sum of $118.75..... 237 50
Int. from Jan. 30, 1872, to Oct. 20, 1878.. 95 59 333 09

10. Due by James A. Watkins and —— Reynolds, his security, for lot No. 5, containing 12 acres, last bond 285 00
Int. from Ap'l 1, 1872, to Oct. 20, 1878.. 112 10 397 10

11. Due by Wm. K. Tabb and Thomas Tabb, his security, for one-half lot No. 7, 5 acres, three bonds, each in the sum of $118.75..... 356 25
Int. from Feb'y 1, 1872, to Oct. 20, 1878 143 39 499 64

12. Due by T. S. Tennis, Tennis & Co., Tennis & Gatewood, George Schermerhorn, John Saunders, B. M. Johnson, S. J. White, Jerome Titlow, and Wm. S. Howard and Ro. B. Wood, for lot No. 9, containing 40 acres, four bonds, each for $950.

131 The first bond has been paid in full, with the exception of four acres due by Wm. S. Howard, who has paid only the cash payment.

Of the second and third bonds James S. Darling has paid one-half.

Of the second bond T. S. Tennis has paid three-tenths.

Second and third bonds together	1,900 00	
Int. from Ap'l 1, 1872, to Oct. 20, 1878	747 33	
	$2,647 33	
One-half paid by Darling	1,323 66	
	$1,323 67	
Three-tenths of one off, p'd by Tennis	397 10	
Bal. due on two bonds	$926 57	
Fourth bond	950 00	
Interest	373 66	
		2,250 23

T. S. Tennis has departed this life, and a suit has been installed to sell this piece.

13. Due by Mrs. Malvina Elliott, and first, second, and third installments have been paid (No. 3, 15 acres); this last installment to be credited with $176.12, of the 13th day of Jan'y, 1877:

Fourth installment	356 25	
Int. from Feb'y 1, 1872, to Oct. 20, 1878	143 39	
		499 64

14. Due by Phoebus, Fulton, and Kimberly, No. 4 and No. 6, 24 acres; first and second bonds paid:

Third bond	570 00		
Int. to Dec. 3d, 1875	125 40		
	$695 40		
Paid Dec. 3d, 1875	504 45		
Bal. due on third bond Dec. 3, 1875		190 95	
Int. to Oct., 1878		30 55	
			221 50
132 Fourth bond		570 00	
Int. from April to Oct., 1878		223 50	
			793 50

15. Due by J. B. Whitehead and Jno. S. Tucker; they have paid three bonds now due:

Fourth bond	475 00	
Int. from July 1, 1872, to Oct. 20, 1878	179 71	
		654 71

Total due on purchases of lots in Hampton and parcels of land at Newport's News, with interest added to Oct. 20, 1878	$10,823 90

Decree. Oct 22d, 1878.

BRINKLEY and WHITING
vs.
LATIMER, WEST, &c.

WILLIS and *ux.*
vs.
LATIMER, &c.

PEEK
vs.
WEST.

} In Chancery.

These causes this day again came on to be heard together upon the papers formerly read, and upon the report of Special Com'r G. M. Peek of the payments made to creditors and of the balance due by the purchasers of land in these causes, filed on the — day of October, 1878, to which report no exceptions have been filed, and was argued by counsel.

On consideration whereof the court doth confirm the said report, and doth further adjudge, order, and decree that the purchasers of the several lots and parcels of land sold under decrees in these causes do, within sixty days from the service of this decree upon them, deposit to the credit of these causes in the Marine Bank of Norfolk the several balances due by them on their bonds given for the purchase-money of the said lots and parcels of land in the following sums, to wit: That A. J. Ford do deposit the sum of $1,938.75, with interest on the sum of $1,375, a part thereof, from the 20th day of October, 1878, till the day of deposit, the balance due by him on his purchase of lot No. 10, containing 60 acres of the
133 Newport News tract; that H. C. Whiting, L. H. Sclater, and Jesse P. Hope, survivors, and the personal representative of M. A. Shield, dec'd, with interest on $1,900.00, a part thereof, from the 20th day of October, 1878, until the day of deposit, that being the balance due by them and M. A. Shield, dec'd, for the purchase of lot No. 2, containing 40 acres of the Newport News land; that H. Phoebus, Wm. H. Kimberly, and Joseph Fulton deposit the sum of $1,015, with interest on $760.95 from the 20th day of October, 1878, till the day of deposit, that being the balance due by them for the purchase of lots Nos. 4 and 6, containing 24 acres of the tract aforesaid; that Wm. K. Tabb deposit the sum of $499.64, with interest on $356.25 from the 20th day of October, 1878, till the day of deposit, that being the balance due by him of one-half of the "lot No. 7," containing 5 acres of the said tract; that James A. Watkins deposit the sum of $397.10, with interest on $285.00 from the 20th day of October, 1878, till the day of deposit, that being the balance due by him on his purchase of lot No. 5, containing 12 acres of the said tract; that D. G. Marrow deposit the sum of $333.09, with interest on $237.50 from the 20th day of October, 1878, till the day of de-

posit, that being the balance due by him on his purchase of one-half of lot No. 7, containing 5 acres of the said tract; that John S. Tucker and John B. Whitehead deposit the sum of $654.71, with interest on $475 from the 20th day of October, 1878, till the day of deposit, that being the balance due by them on their purchase of lot No. 8, containing 20½ acres of the said tract; that Wm. S. Howard, George Schermerhorn, John S. Saunders, Jerome Titlow, B. M. Johnson, Robert B. Wood, and S. J. White, survivors, and N. Gammel, surviving partner of T. S. Tennis & Co., W. T. Gatewood, surviving partner of Tennis & Gatewood, and Benj. Tennis, executor of T. S. Tennis, dec'd, deposit the sum of $2,250.23, with interest on $1,876.57 from the 20th day of October, 1878, till paid, that being the balance due by them on their purchase of lot No. 9, containing 40 acres of the said tract; that Malvina Elliott deposit the sum of $499.44, with interest on $356.25 from the 20th day of October, 1878, until the day of deposit, that being the balance due by her on her purchase of lot No. 3, containing 15 acres of the said tract; that P. P. Davis deposit the sum of $72.00, with interest on $50 from October 20th till the day of deposit, that being the balance due by him on his purchase of a lot of land sold in these causes; that H. C. Whiting deposit the sum of eighty-six $\frac{40}{100}$ dollars, with interest on $60 from the 20th day of October, 1878, till paid; that Geo. Felton deposit the sum of $135.72, with interest on $9,425 from the 20th day of October, 1878, till the day of deposit, which are the
134 respective sums due by the said Whiting and Felton upon their bonds for the purchase of two lots sold under a decree in these causes and located on S. Back street, in Hampton.

And it appearing that there is a balance of $250.05 due by C. K. Mallory and Wm. S. Howard, his security, upon the purchase by said C. K. Mallory of the lot at the corner of S. Back and Queen streets, in Hampton, and that the said C. K. Mallory in his lifetime sold a greater portion of said lot to others and there is still remaining a portion of said lot unsold, by consent of the executrix of the said C. K. Mallory the court doth adjudge, order, and decree that the special com'rs hereinafter named do make sale of the said remaining part of said lot at auction, at the cross-streets in the town of Hampton, said county, upon the terms hereinafter mentioned; and it is ordered that Hiram Freeman, Cornelius Allen, and Wm. Randall, the purchasers of parts of the said lot, be summoned by the clerk of this court to appear at the next term to show cause why the part of said lot occupied by them should not be sold to pay the said balance of the purchase-money due by the said C. K. Mallory.

And the court doth further adjudge, order, and decree that when any of the said purchasers have made the deposits herein directed they will file the certificates of their deposits in the papers in these causes, and upon the filing thereof the clerk of this court will deliver to them their bonds which have been executed for said purchase-money, and G. M. Peek, as special com'r hereby appointed for the purpose, will execute and deliver to them, or such of them as shall so pay the said purchase-money, deeds with special warranty for the respective lots or parcels of land purchased by them, as fully

described in the reports of special com'rs of sale in these causes; and should any of the said purchasers fail to make the deposits directed in this decree within sixty days of a service of this decree upon them, then such of them as shall be in default are required to appear at the next regular or special term of this court, whichever shall occur first, to show cause why the respective lots of land so purchased by them shall not be sold for the unpaid installments of the purchase-money.

And the court doth further adjudge, order, and decree that unless the said Geo. Felton, who has been summoned, shall make the deposit he is directed to make within the said sixty days that Thomas Tabb and G. M. Peek, special com'rs, shall sell at public auction, at the cross-streets in the town of Hampton, said county, after 20 days' notice of the time and place of sale, that certain house and lot located on S. Back street, in Hampton, said county, and bounded by the street, a branch of Hampton creek, and the lots of Arm-
135 istead and others, upon the following terms: One-third in cash and the balance on a credit of six and twelve months, the purchaser to execute his bonds for the deferred payments, with approved security, bearing interest from the day of sale, waiving the homestead exemption (if in the opinion of said special com'rs the same be necessary), and payable to the said special com'rs.

And the court doth further adjudge, order, and decree that G. M. Peek, as special com'r of the court, check upon the fund that may be deposited to the credit of these causes in the Marine Bank in favor of the creditors of the said Parker West, deceased, or their attorneys the respective amounts that appear to be due them by the said report of G. M. Peek, com'r, filed on the 8th day of October, 1878, and the said special com'r will check upon the said fund for the sum of fifty dollars, his fee.

(Pages 274, 275, 276, 277, 278, 279, and 280 of MS. record omitted.)

Decree. April 28th, 1879.

BRINKLEY and WHITING
vs.
LATIMER, &c.

WILLIS and *ux.*
vs.
LATIMER, &c. } In Chancery.

PEEK
vs.
WEST, &c.

On the motion of the plaintiff, Florence Shield, the widow, and Mary Shield and Mallory Shield, the heirs-at-law, of Mallory A. Shield, deceased, and Jerome Titlow, his personal representative, are made parties defendant to the first and last named causes; and

the court doth appoint S. E. Bickford guardian *ad litem* to defend the interests of the infant defendants, Mary and Mallory Shield, who answered by their guardian *ad litem*.

These causes then this day came on to be heard together upon the papers formerly read, the answers of Florence Shield and of the infant defendants, Mary and Mallory Shield, by S. E. Bickford, their guardian *ad litem*, and of Jerome Titlow, personal representative of M. A. Shield, dec'd, with general replications thereto; the petitions of Jacob Heffelfinger, G. B. West, James S. Darling, H. L.
136 Schmelz & Co., Benj. Tennis, executor of T. S. Tennis, dec'd, and A. B. Green, filed by leave of the court at this term, and *was* argued by counsel.

On consideration whereof, it appearing that Mallory A. Shield has not paid his portion of the purchase-money for lot No. 2 of the Newport's News tract, purchased by Whiting, Sclater, Shield, and Hope at a sale made under a decree in these causes on the 9th day of December, 1871, and that the personal representative of the said M. A. Shield*s* has also failed to pay the same, the court doth adjudge, order, and decree that unless the said Florence Shield, Mary Shield, or Mallory Shield or some one for them shall, within 30 days after the adjournment of this court, pay to Thomas Tabb and G. M. Peek, special com'rs, the sum of $237.50, with interest thereon from the 9th day of December, 1871, until paid, that being the balance due of one-eighth of said lot of lands, that the said special com'rs shall resell at public auction, at the cross-streets in the town of Hampton, Elizabeth City county, after giving 20 days' notice of the time and place of sale by printed posters posted at three or more public places in said county, one undivided eighth part of the lot of land designated on the plat of Wm. Ivy, filed in these causes as lot No. 2, containing 40 acres of the Newport News tract, of which Parker West died seized, and located in Elizabeth City county, and bounded by the lands of Burke and others, upon the following terms: Cash enough to pay the expenses of sale and the sum of $237.50, with interest from the 9th day of December, 1871, till the day of sale; and as to the balance, if any, upon a credit of one year, the purchaser executing his bond, with approved security, payable to the said com'r in one year, bearing interest from the day of sale, for the deferred payment; and when the purchaser thereof shall pay to the said special com'rs the whole of the purchase-money they are directed to execute and deliver to him a deed with special warranty conveying the said one-eighth part of the said lot of land.

And the court doth further adjudge, order, and decree that when the whole of the purchase-money bonds executed by T. S. Tennis, T. S. Tennis & Co., Tennis & Gatewood, George Shermerhorn, and others, with the interest due thereon, shall be paid as directed by decree in these causes at the last term that G. M. Peek, as special com'r, shall convey by a deed or deeds with special warranty the lot designated as lot No. 9 in the said plat of Wm. Ivy, containing 40 acres, in such undivided parcels and to such persons as their interests appear—that is to say, to James S. Darling, 20 acres thereof; to Jacob Heffelfinger, six

acres thereof; to H. L. Schmelz & Co., four acres thereof; to W. T. Gatewood, surviving partner of Tennis & Gatewood, two
137 acres thereof; to Wm. S. Howard, four acres thereof; to A. J. Ford, two acres thereof, and to John Saunders, two acres thereof; and when the whole of the purchase-money bonds executed by Whiting, Hope, &c., for the lot designated as lot No. 2 on said plat of Wm. Ivy shall be paid as directed by decree at the last term the said special com'r will convey by deed or deeds with special warranty the said lot of land No. 2, containing 40 acres, of the said "Newport News" tract, in such undivided parcels and to such persons as their interests appear—that is to say, to H. C. Whiting, ten acres thereof; to L. H. Sclater, five acres thereof; to A. J. Ford, five acres thereof; to A. B. Green, five acres thereof; to G. B. West, five acres thereof, and to the said widow and the heirs of M. A. Shield as their interests entitle them to receive, should they pay the balance herein required to be paid by them, otherwise to the purchaser at the sale herein directed, five acres thereof.

And it appearing that the decree entered in these causes at the last term has been served upon the purchasers of lands in these causes who are in default, and that sixty days have elapsed since the service thereof, the said special com'rs are directed to execute the decree entered at the last term in these causes against such of them as shall continue in default of the payments of the respective balances due by them.

And it further appearing that Wm. Randall, Hiram Freeman, and Cornelius Allen have been summoned to show cause why the lots of land purchased by them of Charles K. Mallory should not be sold to pay the balance due by the said Mallory on his purchase of the same, the court doth adjudge, order, and decree that one of the commissioners of this court ascertain and report to the court who are the purchasers from C. K. Mallory of the lot of land at the corner of Queen and South Back streets, in Hampton, and the order of their purchase, the price they agreed to pay, whether the same has been paid or not, and to whom, and the said commissioners will render an account of the balance due by C. K. Mallory upon the said lot, crediting the net proceeds of the sale of that portion of the said lot which was not sold by C. K. Mallory in his lifetime. He will also render an account of any further claims against the estate of Parker West, dec'd.

And the court doth further adjudge, order, and decree that G. M. Peek, special com'r, check upon the fund deposited in the Marine Bank to the credit of these causes in favor of M. H. Haas, sheriff, for $11.50, and in favor of S. E. Bickford, clerk, for $23.39, their costs in these causes to the present term, and in favor of himself for fifteen dollars, fees for deeds to Malvina Elliott, D. G. Marrow, and H. C. Whiting for lots of land purchased by them in this cause.

138 (Pages 288, 289, 290, 291, 292, 293, 294, and 295 of MS. record omitted.)

Decree. Oct. 28th, 1879.

BRINKLEY and WHITING
vs.
LATIMER, &c.

WILLIS and *ux.*
vs.
LATIMER.

PEEK
vs.
WEST, &c.

} In Chancery.

These causes came on this day again to be heard upon the papers formerly read and on the report of Special Com'rs G. M. Peek and Thomas Tabb of the sale of land directed to be sold by the last decree in these causes, the report of Com'r Jno. Booker, filed Sept. 17th, 1879, to which report no exceptions have been filed, and *was* argued by counsel.

On consideration whereof the court doth confirm the said report of Special Com'rs Tabb and Peek and the sales therein reported, and doth also confirm the said report of Com'r Booker.

And the court doth further adjudge, order, and decree that Special Com'r G. M. Peek do check upon the fund deposited and to be deposited to the credit of these causes in the Marine Bank of Norfolk in favor of Mary E. Marrow, wife of Wm. P. Marrow, for the sum of two hundred and ninety-four dollars, in favor of Elizabeth West for the like sum of two hundred and ninety-four dollars, and in favor of Missouri Smith, wife of —— Smith, for the like sum of two hundred and ninety-four dollars, and that the bond executed by G. B. West for two hundred dollars, dated on the 1st day of Jan'y, 1872, bearing interest from date, for the balance of the purchase-money for 15 acres of the Newport's News tract, after releasing the Watson claim, be, and the same is hereby, cancelled; that said Mary E. Marrow, Elizabeth West, Missouri Smith, and G. B. West, being the heirs of Parker West, deceased, *and* entitled to have distribution among them of the balance of the fund in this cause after the payment of the debts of the said Parker West.

And it appearing that James S. Darling has purchased of M. S. Shield in his lifetime five acres of a tract of 40 acres, described in the plat of Wm. Ivy as lot No. 2 of the Newport News 139 tract, as is evidenced by the deed of the said M. A. Shield, filed in these causes, and has deposited the balance due thereon to the credit of this cause in the Marine Bank of Norfolk, it is ordered that Special Com'r G. M. Peek, in conveying the land heretofore directed to be conveyed to the said James S. Darling, will also convey with special warranty unto the said James S. Darling the said 5 acres of the tract aforesaid.

And it appearing from the report of Com'r Booker and the pro-

ceedings in these causes that Wm. Randall was the last purchaser from C. K. Mallory of a portion of the lot situate at the corner of Queen and South Back streets, in Hampton, and that there is due upon the said purchase-money from the said C. K. Mallory, the original purchaser under a decree in these causes, the sum of $139.97, with interest from 20th Oct., 1879, the court doth adjudge, order, and decree that the said Wm. Randall, before the next term of this court, deposit to the credit of these causes in the Marine Bank of Norfolk the said sum of one hundred and thirty-nine and $\frac{97}{100}$ dollars, with interest thereon from the 20th day of October, 1879, until the day of said deposit, and when the said deposit is made and a certificate thereof is filed in the papers in these causes the said special com'r, G. M. Peek, will convey by deed with special warranty the said lot of land located in Hampton, Elizabeth City county, at the corner of Queen and South Back streets, to the purchasers from said C. K. Mallory as their interests appear; and Special Com'r G. M. Peek, out of any money in his hands, will pay to Com'r John Booker the sum of $15, his fee for rendering his report in this cause.

Statement of Distribution. April, 1880.

By decree of Oct., 1879—

Mrs. Marrow rec'd		$294 00
Miss Lizzie West rec'd		294 00
Mrs. M. Smith rec'd		294 00
And G. B. West rec'd his bond and deed for lot No. 1, 15 acres		294 00

By decree to be entered April, 1880—

Mrs. Marrow to receive		$1,000 00
Miss Lizzie West to receive		1,000 00
Mrs. M. Smith to receive		1,000 00

And Geo. B. West as follows:

140	The balance due by Dr. Hope on five acres of lot No. 2	$237 50	
	Int. to April 20, 1880	119 54	
	Paid by him for the land	$357 04	
	For which he is to receive a deed and the sum of	642 96	
	To make his equal to the others		1,000 00
			$4,000 00

Report of Special Com'r Peek. April 23, 1880.

BRINKLEY, &c.,
vs.
LATIMER, &c.

WILLIS and *ux.*
vs.
LATIMER.

PEEK
vs.
WEST, &c.

} In Chancery.

To the Hon. B. W. Lacy, judge of the circuit court of Elizabeth City county:

The undersigned, special com'r, appointed by the court by decree in the above suits pronounced 22d Oct., 1878, would respectfully report that he has drawn upon the fund deposited in the Marine Bank, Norfolk, to the credit of said causes by virtue of said decree in favor of the creditors of Parker West and in favor of the heirs of Parker West as follows:

I.

1.	To Wm. S. Howard, assignee of A. Adler		$199 56
2.	" G. C. Mellen for Mellen & Son (Peek, att'y)		184 00
3.	" G. M. Peek, att'y for Peek's assignee		288 66
4.	" " " " T. Peek & Son		91 85
5.	" T. Tabb, att'y for Wm. Lee's per. rep., at 10 per cent.		1,077 36
6.	" T. Tabb, att'y for F. Mallory's ex.		67 12
7.	" " " " "		53 94
8.	" " " " M. L. Lake		37 20
	9. To T. Tabb, att'y for J. M. Moore		121 80
141	10. To Wm. S. Howard, assignee of C. K. Mallory		132 89
	11. " " " J. B. Cary		94 11
12.	The costs to officers directed to be paid by said decree, as follows:		
		$15 00	
		11 00	
		29 00	
		50 39	
			105 39
			$2,453 88

To the heirs of Parker West:

To Mary E. Marrow, wife of Wm. P. Marrow		$294 00
" Elizabeth B. West		294 00
" Geo. B. West, his bond for $200, with interest from from Jan'y 1, 1872, given for the blance due by him on 15 acres of Newport's News		294 00
" Missouri Smith		294 00

To the present time the distribution among the heirs of P. West has been equal. There are no debts against P. West unpaid, within the knowledge of your com'r, except claim against West preferred by the Skinner heirs, which is not yet decided.

II. Your com'r further reports that he has executed deed conveying parts of the Newport's News tract described therein to the following purchasers:

To James A. Watkins, for lot No. 5, Ivy's plat.
" G. B. West, lot No. 1, 15 acres, Ivy's plat.
" A. J. Ford, part of lot No. 2, Ivy's plat.
" " " " " 9, " "
" L. H. Sclater, " " " 2, " "
" H. C. Whiting, " " " 2, " "
" James S. Darling, " " " 2, " "
" " " " " 9, " "
" J. Heffelfinger, " " " 9, " "
" W. H. Kimberly, " " " 4, " "
" H. Phoebus, " " " 4&6, " "
" J. G. Fulton, " " " 6, " "
" J. B. Whitehead, whole " " 8, " "
" Jno. S. Saunders, part " " 9, " "
" S. M. Bowman, " " " 10, " "
" A. J. Ford, " " " 10, " "

Your com'r has also received the balance of the purchase-
142 money due by Chas. Selden on the lot on S. Back street, in Hampton, first purchased by Geo. Felton, who failed to pay for the same, and he has conveyed the same to him by deed, with special warranty.

III. An account of the cash received by Special Com'r G. M. Peek and his disposition thereof:

1879.				
Aug. 2.	Rec'd of Annie Garrett			$16 00
July —.	" "			5 00
" "	" "			10 50
Dec. 1.	Rec'd of Chas. Selden			50 75
	Paid to T. Tabb one-half and G. M. Peek one-half com'ns sale to Garrett	$3 25		
	Paid to T. Tabb one-half and G. M. Peek one-half com'ns sale to Darling	16 46		
	Auctioneer's fee of sale to Darling	3 75		
	Printing posters	1 75		
	Paid Jno. Booker's com'r's fee	15 00		
	Sixteen deeds to purchasers, @ $5	80 00		
	Bal. due com'r			37 96
		$120 21		$120 21
	1 per cent. com'n for disbursements			$24 53
	Balance as above			37 96
				$62 49

IV. Your com'r further reports that the claim herein reported to have been paid to Wm. S. Howard of $132.89 is a bond which was assigned by C. K. Mallory for $65 principal, and was paid to C. K. Mallory as att'y for Wm. S. Howard; but the said Howard disclaims having employed the said C. K. Mallory, and as the said C. K. Mallory represented in these causes the defendant P. West, he is entitled to a fee for his services, and the sum received through mistake should be allowed to him as his fee.

Very respectfully,

G. M. PEEK,
Special Com'r.

Contract. April 23d, 1880.

This contract, made this 1st day of April, 1879, between
143 Jesse P. Hope and George B. West, witnesseth: That the said Jesse P. Hope agrees to sell, and the said Geo. B. West agrees to buy, the interest of the said Jesse P. Hope in the lot No. 2, Ivy's plat of Newport News, filed in the suits of Brinkley, &c., *vs.* Latimer, &c.; Willis and Wife *vs.* Latimer, and Peek *vs.* West, it being 5 acres of the said tract of land located at Newport's News, in Elizabeth City county; and the said G. B. West agrees to pay the sum of $500, with interest from this date, for the said land, the said $500 to be paid out of the distributive share of the said G. B. West in the proceeds of the sale of the said Newport News tract after the debts of his father, Parker West, dec'd, are all paid, and the said payment to be made when the distribution aforesaid is effected; and it is agreed that the court shall direct a deed to be given to the said G. B. West for the said land, a sufficient part of the said $500 to be appropriated toward the payment of the balance due by the said Jesse P. Hope on the said land to discharge the same, and the balance to be paid to the said Jesse P. Hope.

Witness our hands and seals this the 1st day of April, 1880.

JESSE P. HOPE. [SEAL.]
GEO. B. WEST. [SEAL.]

Decree. April 23d, 1880.

BRINKLEY, &c.,
vs.
LATIMER, &c.

WILLIS and *ux.*
vs.
LATIMER.

PEEK
vs.
WEST, &c.

} In Chancery.

These causes came on this day again to be heard on the papers formerly read on the petition and contract of Geo. B. West and J.

P. Hope, filed at this term, and on the report of Special Com'r G. M. Peek, to which report no exceptions have been taken, and was argued by counsel.

On consideration whereof the court doth confirm the said report of Special Com'r Peek, and doth further adjudge, order, and decree that the deed executed by Special Com'r Peek, conveying to Charles Selden the lot of land mentioned in the proceedings as located
144 on S. Back street, in the town of Hampton, shall be construed to convey such estate as the said Parker West, dec'd, had therein as fully and completely as if the same had been decreed to be executed by the court in these causes, the said Charles Selden having paid all the purchase-money therefor, and the same has been properly applied.

And the court doth further adjudge, order, and decree that G. M. Peek, as special com'r of the court, do check upon the fund deposited to the credit of these causes in the Marine Bank of Norfolk in favor of Mary E. Marrow, the wife of Wm. P. Marrow, for the sum of one thousand dollars; in favor of Elizabeth R. West for the like sum of one thousand dollars; in favor of Missouri Smith, the wife of M. Smith, for the like sum of one thousand dollars, and in favor of Geo. B. West for the sum of six hundred and forty-two dollars and 96 cents, that being the difference between the balance due on the five acres of the Newport News tract by J. P. Hope, which the said G. B. West has agreed by his contract, filed at this term, to pay, and the sum of one thousand dollars, his distributive share of the fund distributed among the heirs of Parker West, dec'd, at this term.

And the said special com'r will also check upon the said fund in his favor for the sum of sixty-two $\frac{49}{100}$ dollars, which appears by his report to be due him.

And — is further ordered that one of the commissioners of this court do ascertain and report at the next term if the judgment reported by Com'r Howard in favor of Jno. D. Gordon & Co. against Parker West, dec'd, has been by him correctly reported and if there is any sum remaining due thereon.

And the court doth further adjudge, order, and decree that G. M. Peek do check upon the fund to the credit of these causes in the Citizens' Bank of Norfolk for the sum of $4.65, the balance, with interest, appearing to be on deposit in the said bank, which sum he will apply to the payment of costs.

And the court doth further adjudge, order, and decree that G. M. Peck, as special com'r, do convey by deed, with special warranty, to Geo. B. West one-eighth part of the lot of land described in the plat of Wm. Ivy, filed in the papers as lot No. 2 of the Newport's News tract, located in the county of Elizabeth City, the said parcel of lot No. 2, containing 5 acres, to be laid off next to the lot No. 1, purchased under a decree in these causes by said G. B. West, running from the river to the rear line, so as to have a front and back line bearing the same proportion to the extent of the front and rear of the whole lot No. 2 as the five acres bear to the number of acres in lot No. 2.

And these causes are continued.

145 (MS. record pages 311 to 331, inclusive, omitted.)

STATE OF VIRGINIA, *Elizabeth City County,* } *To wit:*

I, S. E. Bickford, clerk of the circuit court for the county of Elizabeth City, do hereby certify that the foregoing is a true copy of the record and proceedings of the causes therein named as the same appear on file and record in my office.

Witness my hand, at the court-house of said county, this October 1st, A. D. 1885.

S. E. BICKFORD, *Clerk.*

Petition of John S. Tucker.

In the Circuit Court of Warwick County. In Chancery.

WM. P. MARROW and MARY E., His Wife, GEO. P. WEST, and MISSOURI SMITH, Plaintiffs,

vs.

JOS. B. BRINKLEY, JOHN L. PEEK, JOHN B. WHITEHEAD, ALFRED P. Thom, Trustee; Wm. H. Kimberly, Martin McDevitt, Chas. F. Groome and Emma D., His Wife, George W. Schermerhorn, and George Booker, Defendants.

The petition of John S. Tucker, now of the city of Washington, in the District of Columbia, respectfully represents that he is the owner of an individual one-half interest in the twenty and one-half (20½) acres of land, lot No. 8 of the Newport News tract, in the bill and proceedings mentioned, which were conveyed by George M. Peek, special commissioner, to John B. Whitehead; that the said John B. Whitehead and wife conveyed the said one-half interest to your petitioner by deed dated December 4th, 1886, and duly recorded in the clerk's office of Warwick county court, a copy of which is herewith filed, marked Exhibit "A A," and prayed to be taken as a part of this petition, the said deed reserving a lien, however, on the said one-half interest for an indebtedness of your petitioner of $1,377.43 and interest thereon, held by A. P. Thom, trustee, and of $1,162.22 and interest thereon, held by R. B. Tunstall, trustee.

Your petitioner therefore prays that he may be made a
146 party defendant to this suit and allowed to file a demurrer and answer to the plaintiffs' bill in the said cause.

And your petitioner will ever pray, &c.

JOHN S. TUCKER.

WALKE & OLD, *P. D.*

DISTRICT OF COLUMBIA, *City of Washington,* } *To wit:*

This day personally appeared before me, R. H. Evans, a notary public for the city of Washington, in the District of Columbia, John

S. Tucker, whose name is signed to the foregoing petition, and made oath that the matters and things therein contained are true.

Given under my hand and seal this 13th day of April, 1886.

R. H. EVANS, [SEAL.]
Notary Public.

EXHIBIT "A A."

This deed, made this the fourth day of December, in the year eighteen hundred and eighty-five, between John B. Whitehead and Emily, his wife, of the city of Norfolk, in the State of Virginia, of one part, and John S. Tucker, of the city of Washington, in the District of Columbia, of the other part.

Whereas by deed dated March 16th, 1880, and of record in the clerk's office of Elizabeth City county, the said John B. Whitehead received a conveyance from George M. Peek, special commissioner, of the tract of land hereinafter mentioned and set out; and whereas, although the legal title to the whole of said land was so vested in the said John B. Whitehead, the said John S. Tucker was the owner of an undivided one-half thereof, subject to the amount of certain indebtedness of the said John S. Tucker, which amount it is hereby agreed is the sum of twenty-five hundred and thirty-nine $\frac{65}{100}$ dollars, with interest, of which thirteen hundred and seventy-seven $\frac{43}{100}$ dollars, with interest thereon from July 1st, 1883, is now held by Alfred P. Thom, trustee, and eleven hundred and sixty-two $\frac{22}{100}$ dollars, with interest thereon from April 15th, 1885, is now held by Richard B. Tunstall, trustee; and whereas the said John B. Whitehead desires to make a declaration of the trust in him as aforesaid, and to convey to the said John S. Tucker the undivided one-half interest in the said land, subject to the said indebtedness of the said John S. Tucker of twenty-five hundred and thirty-nine $\frac{65}{100}$ dollars and interest as aforesaid:

Now, therefore, this deed witnesseth:

147 That the said John B. Whitehead doth make declaration of the trust in him as aforesaid, subject as aforesaid, and he, the said John B. Whitehead, and Emily A., his wife, in consideration of the premises and of the sum of five dollars to him in hand paid by the said John S. Tucker at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted and conveyed, and do hereby grant and convey, with special warranty, unto the said John S. Tucker and his heirs an undivided one-half interest in that certain piece or parcel of land which was conveyed as aforesaid by the said George M. Peek, special commissioner, to the said John B. Whitehead, situated in the county of Warwick (as the line of the county now runs, though formerly in Elizabeth City county), in the State of Virginia, designated on the plat of Wm. Ivy, of the Newport News tract, formerly the land of Parker West, as lot No. 8, containing twenty and one-half ($20\frac{1}{2}$) acres, and bounded on the southwest by James river, on the north by Pumpkin Hall tract and separated from it by Newport News creek, on the west by lot No. 7 on said plat, and on the

east by lot No. 9 of the said plat, subject to and with the express reservation of a lien on the said undivided one-half interest in the said land for the amount of the said indebtedness of thirteen hundred and seventy-seven $\frac{43}{100}$ dollars, with interest thereon from the 1st day of July, 1883, at the rate of 6 per centum per annum, held by Alfred P. Thom, trustee, and of eleven hundred and sixty-two $\frac{22}{100}$ dollars, with interest thereon from the 15th day of April, 1885, at the rate of 6 per centum per annum, held by Richard B. Tunstall, trustee.

Witness the following signatures and seals.

JNO. B. WHITEHEAD. [SEAL.]
EMILY A. WHITEHEAD. [SEAL.]

The words "with special warranty," between second and third lines on the second page, interlined before signing.

H. C. WHITEHEAD,
Notary Public.

VIRGINIA:

In the clerk's office of Warwick county court, Feb'y 5, 1886.

This deed was received and with certificate annexed admitted to record.

Teste:

WM. H. WYNNE, *D. C.*

A copy. Teste.

148 *Answer of William H. Kimberly. Filed by Leave of Court June 10, 1886.*

The demurrer and answer of William H. Kimberly to a bill of complaint exhibited against him and others in the circuit court of the county of Warwick by William P. Marrow and Mary E., his wife, George B. West, and Missouri Smith, complainants.

Your respondent, William H. Kimberly, says that the said complainants' bill is not sufficient in law, and, not waiving his demurrer, but reserving to himself all just exception to the said bill, for answer thereto, or so much thereof as he is advised it is material he should answer, answering, says:

I. The title of Parker West, as set forth in the 1st paragraph of said bill, to the property therein described, and his occupation and possession of the same as therein alleged, is admitted. It is also admitted that certain proceedings for the confiscation of said property were instituted in the United States district court at Norfolk, as stated in the 1st paragraph of said bill; but as to the effect of the said confiscation proceeding she prays reference to Exhibit "A," filed with the complainants' bill.

II. He admits the institution of the suits in the circuit court of the county of Elizabeth City, as alleged in said bill, and prays reference to the record of said proceedings, filed with this answer as a part thereof, for the particulars and effect of said suits.

III. He admits proceedings in said causes of the character alleged in the 3rd paragraph of said bill, and again prays reference to the record of said causes, herewith filed, for the particulars, construction, and effect of the said proceedings.

IV. He admits the rendition of the degree of May 4th, 1871, and avers that the absolute fee simple of the lands was by the said decree intended to be sold, and where the estate had been the subject of confiscation proceedings the absolute fee, subject to such rights as the purchaser under said proceedings might have, was intended and proposed by the court to be sold. The said Parker West was at this time an old man and very infirm, and it was evident if such purchaser had acquired any interest whatever in such lands it must soon terminate.

V. He says that the effect of the said confiscation proceed-
149 ings, if they have any bearing whatever in this cause, which your respondent wholly denies, is a matter to be determined by this honorable court.

And he further says that the rights of the creditors of the said *Patrick* West were in no manner affected by said proceedings upon his death. Upon the death of said Parker West the said lands descended to his heirs-at-law, subject to the rights of his creditors at the time of confiscation, precisely as if there had been no confiscation of the same. The said circuit court of the county of Elizabeth City is a court of general jurisdiction, and the property which is the subject of this controversy was then located within the territorial limits of the said county and within the jurisdiction of said court.

He denies that the decree of May 4th, 1871, is absolutely null and void, and that at its date the heirs of Parker West were necessary parties to the said suit. The said Parker West was living at this time, and consequently had no heirs. Upon the death of said Parker West, which ascertained his heirs, they promptly and properly became parties to said suit, as appears from the record of the same; and your respondent denies that the sales or the deeds mentioned in the 5th paragraph of said bill are null and void.

VI. He admits that the special commissioners mentioned in the 6th paragraph of said bill duly reported the sales made by them as alleged therein. It is true that Parker West died intestate in 1871 (December), leaving as his next of kin and heirs-at-law the following children, viz: Mary E., who had intermarried with William P. Marrow; Elizabeth R. West, George B. West, and Missouri Smith.

Your respondent cannot undertake to say what were the impressions of the said plaintiffs, or as to their knowledge of the legal effect of the confiscation proceedings upon their rights in said property. He does, however, say that at that time the general impression among lawyers whose opinions were worthy of consideration, with but few exceptions, was that confiscated property upon the death of the ancestor whose estate had been confiscated descended to his heirs-at-law, subject to the rights of his creditors existing at the time of the confiscation, as if there had never been any confiscation, and such was the opinion of the circuit court of the county of Elizabeth City upon the rendition of the decrees complained of in the com-

plainants' bill, and which the said complainants well know. The said complainants were fully cognizant of the fact that proceedings were pending in the circuit court of Elizabeth City county for the sale of said lands, and that the said lands were being sold under decrees of said court.

150 Your respondent purchased from Messrs. Mallory, Tabb, and Peek, special com'rs, six acres of the said Newport News tract, which said sale was duly ratified and confirmed by decree of the circuit court of the county of Elizabeth City pronounced in the said causes on the 4th day of May, 1872 (three acres of the said land being now involved in this suit), your respondent being wholly ignorant of any infirmity whatever in the said decree. He paid the whole of the purchase-money and received his deed for the said land on the 15th day of January, 1880, your respondent being wholly ignorant of the claim now being made by the said plaintiffs to this land, never deeming it possible that the late Charles K. Mallory would assume to represent any party in court without authority so to do.

He is advised that the said complainants, by their deed bearing date the 19th day of April, 1872 (a certified copy is filed with this answer as a part thereof), expressly referring to the sales made by the said commissioners of sale, undertook to control and direct the proceeds of sale, or at least a part thereof, for certain purposes expressed in said deed; and he denies that the said complainants have any rights whatever in the said land so purchased by him as aforesaid.

The decision in Wallach *vs.* Van Riswick was rendered by the Supreme Court of the United States on the — day of ——, 1875, and immediately upon its rendition it became at once the subject of the most thorough and complete discussion in the county of Elizabeth City. More lands in the county of Elizabeth City (the land now in controversy was then in the county of Elizabeth City) in proportion to its area were sought to be confiscated than any county of the Commonwealth, and all persons who were in any way affected by the said confiscation proceedings at once became fully advised and informed as to the value and character of said decision and as to their rights under the same.

The said complainants do not state correctly the action of C. P. Huntington in reference to his purchase of said lands. It is very certain that at this very time the said C. P. Huntington was exceedingly anxious to purchase the land of your respondent, and was willing to take your respondent's title, not questioning the same. The reason why the agent of the said C. P. Huntington first took options from said parties was this: That the said Newport News tract had been subdivided into a large number of smaller parcels, held by as many persons. The agent of the said C. P. Huntington was desirous to purchase as many of these parcels as he possibly could. This was in the fall of the year 1880. He understood well

151 that if it became known that C. P. Huntington had purchased any number of these parcels, whether one or more, it would become more difficult, if not impossible, for him to purchase

the remainder, so this method of taking options was adopted. The absolute purchase of all the lands at Newport's News of the West farm, which the said C. P. Huntington or his company now own, had been made before the said complainants executed to him their said deed of the 6th day of December, A. D. 1880.

These parties all obtained for their lands the sum of three hundred dollars per acre, whereas the said Huntington gave the said complainants about the sum of forty dollars for their interest in the lands conveyed to him by them as aforesaid. The fact was that the said C. P. Huntington, the well-known president of the Chesapeake and Ohio Railway Company, contemplated spending large sums of money upon the said property, having determined to make Newport's News the terminus of his great line of roads, and he gave the said complainants the sum of eight thousand dollars to purchase this piece, not recognizing that said complainants had any valid claim to said lands.

VII. It is admitted that at the May term, 1872, of the circuit court for the county of Elizabeth City a decree was entered in the said consolidated causes, and the extracts from the said decree stated in the bill of the complainants are true and correct extracts from the same. Your respondent knows nothing whatever of the truth or falsehood of the said recitals. He is an innocent purchaser for value of so much of the said land purchased by him as aforesaid without any notice whatsoever of any claim whatsoever of the said complainants against the said land. Special Com'r G. M. Peek, in obedience to decrees pronounced by the circuit court of Elizabeth City county in said consolidated causes, by his deed bearing date the 15th day of January, A. D. 1880, he having paid all of the purchase-money and received his deed for the said land long prior to any notice received by him of the said claims now sought to be set up against your respondent, *and he* claims he has the right to rely upon the recitals in said decree of May 4, 1872, as of absolute and unimpeachable verity, and he denies that his title can now be questioned by reason of any recitals in the said decree, even if it should be ascertained that said recitals were not true in fact, which your respondent does not in any way admit.

Your respondent further says that the said complainants were fully cognizant of the said proceedings pending in the circuit court of the county of Elizabeth City for the sale of the said land—of the object and purposes of said sale; that the said lands had been
152 purchased by your respondent and others, yet they have remained silent for nearly fourteen years, never once suggesting, so far as your respondent is informed, the slightest objection to the legality of said proceedings.

He is advised and informed that the said complainants in said proceedings were represented by the late Charles K. Mallory, an attorney of the highest character and professional standing. He denies that the said Charles K. Mallory appeared for the said complainants without authority, and he demands full proof of any such allegation. The said Charles K. Mallory at the time of the rendition of said decree now complained of was the leading counsellor in

the said court; he is now dead. No proper investigation can now be had of this allegation imputing such conduct to this distinguished counsel with any regard whatever to the rights of your respondent, who had the right to rely with absolute confidence upon the record of the said court in which the said land was sold. It appearing from said record that the said complainants upon their own motion were admitted parties defendant to the said proceedings, and, further, the said complainants having slept so long and so profoundly upon their rights, they are now, by their own gross and unpardonable laches, estopped from setting up any claim to said land or questioning in any manner your respondent's title to the same.

VIII. Whilst your respondent has no personal knowledge as to the truth of the recitals in the said decree of May 4, 1872, he is informed, believes, and so states that the late Charles K. Mallory, who was well known to the said plaintiffs and at the time an attorney of the said court of the highest character and standing, appeared for and represented the said plaintiffs in said causes at the time of the rendition of the said decree, and continued so to represent them up to the time of his death; and the said C. K. Mallory was a man of too exalted character to do this without authority. The said decree was drawn upon the dictation of the said Charles K. Mallory. The said plaintiffs knew well the character of the said Charles K. Mallory and his inability to make any false or fraudulent representation to the court or to do them the semblance even of injustice.

He denies that the said decree was a fraud upon the plaintiffs or that he is asking the court to perpetuate a fraud. He claims reliance upon the sanctity and verity of the solemn decrees of a court of general jurisdiction, which, to him, should speak absolute truth, upon the faith of which he acquired title to the said land without any notice whatever, or any means of acquiring such notice, of the said claim on the part of the said plaintiffs, and he says that under all the circumstances of this case to recognize any rights in
153 the said property adverse to the title of your respondent would be a fraud almost without a precedent as to him.

IX. He denies the allegations set forth in paragraph 9 of the complainants' bill. It was perfectly proper, without *scire facias*, for the said plaintiffs on their own motion to go into the said circuit court for the county of Elizabeth City, whether by their attorney or in their own proper person, and ask to be made parties defendant in said consolidated causes, and such act cannot be questioned if any verity whatsoever belongs to said record. It is indisputably true that one of the plaintiffs, George B. West, has resided for the last fourteen years upon a part of the said Newport's News tract, and with him resided his sisters, Elizabeth R. West and Missouri Smith. They were regularly visited by the said William P. Marrow and Mary E., his wife, and this very land upon which he resided was purchased by him under decrees pronounced in said causes, which fact was well known to each and all of them.

X. In response to the 10th paragraph of said bill in reference to the report of the 23d of April, 1880, of G. M. Peek, special com'r, he says it appears from the allegation of the complainants' bill in said

paragraph that the checks in question were drawn by the said George M. Peek in their favor, as alleged in said report, and were delivered to the said George B. West, notwithstanding the plaintiffs deny that said facts were true. Whether the said plaintiffs refused to accept the said checks from the said George B. West or whether they were lost by him your respondent does not know. It is certain from the allegations of said bill the said George B. West, who is now a party plaintiff to this suit, accepted his own as well as the other checks from said special com'r, G. M. Peek, without objection. It is also true that from the very beginning of said causes the said George B. West was a party defendant thereto in a fiduciary character.

XI. He admits that in the year 1885 the said plaintiffs and Elizabeth R. West, who has since departed this life, instituted an action of ejectment against him and others, as alleged in the 11th paragraph of said bill, and the said plaintiffs in said action admitted to a nonsuit.

He further admits that the court ruled that no evidence could be heard to attack or impeach the recitals in the said decree of May 4, 1872, in any collateral suit, not deeming it necessary to pass upon the objection taken by the defendants in said action of ejectment as to the competency of the plaintiffs. He denies that the court
154 held in the said action of ejectment that the plaintiffs in this suit had appeared in open court in proper person in the said consolidated cause, if it be intended so to state in said bill. The defense in said suit was upon the ground that the said decree of May 4, 1872, being a domestic decree of a court of general jurisdiction, its recitals could not be attacked or impeached collaterally. It was mentioned by one of the counsel in argument, but simply as argument, that if the recitals in said decree of May 4, 1872, set forth that the plaintiffs had appeared in proper person in open court and moved the said court to make them parties defendant to the said causes that such was the verity belonging to domestic decrees of a court of general jurisdiction that such recitals could not be impeached in a collateral suit.

XII. He deems it unnecessary to answer further the allegations contained in the 12th paragraph of the complainants' bill, he having fully answered all of said allegations in a previous part of this answer, and to which reference is here again made.

XIII. He admits that in the summer of 1885 the said complainants did offer to pay to your respondent the purchase-money, with the interest thereon from the date of his purchase, paid by him for the said land, which offer was then made by them to him for the first time, which offer your respondent then respectfully declined. He is not advised or informed, except from the allegations of said bill, as to the amount of money on deposit in bank to the credit of the said suits. He submits that this is a matter with which he has nothing whatever to do and which can in no manner affect his title to the said land acquired by him, as hereinbefore stated.

The allegations and denials of this answer referring only to the plaintiffs in this cause, your respondent here repeats all such allegations and denials, and includes therein Elizabeth R. West, who is

now dead, so far as they refer to the conduct and knowledge of the plaintiffs in and about the proceedings in said consolidated causes.

And now, having fully answered, he prays to be dismissed hence with his reasonable costs.

THOMAS TABB, *P. D.*

Answer of C. F. Groome and Wife. Filed by Leave of Court June 10, 1886.

The demurrer and answer of Charles F. Groome and Emma D., his wife, to a bill of complaint exhibited against them and others in the circuit court of the county of Warwick by William P. Marrow and Mary E., his wife, George B. West, and Missouri Smith, complainants.

Your respondents, Charles F. Groome and Emma D., his
155 wife, say that the said bill of complaint is not sufficient in law, and, not waiving their demurrer, but reserving to themselves all just exceptions to said bill, for answer thereto, or so much thereof as they are advised it is material they should answer, answering, say:

I. The title of Parker West, as set forth in the 1st paragraph of said bill, to the property therein described, and his occupation and possession of the same as therein alleged, is admitted. It is also admitted that certain proceedings for the confiscation of said property were instituted in the United States district court, at Norfolk, as stated in 1st paragraph of said bill; but as to the effect of the same they pray reference to Exhibit "A," filed with said bill.

II. They admit the institution of the suits in the circuit court of the county of Elizabeth City, as alleged in said bill, and pray reference to the record of said proceedings, filed with this answer, for the particulars and effect thereof, which they pray may be regarded as a part of this answer.

III. They admit proceedings in said causes of the character alleged in the 3rd paragraph of said bill, and again pray reference to the record of said causes, herewith filed, for the particulars, construction, and effect of the said proceedings.

IV. They admit the rendition of the decree of May 4, 1871, and aver that the absolute fee simple of the land and no other estate was sold or intended to be sold—that is, the fee simple, subject to whatever rights the pretended purchasers at the confiscation sale might have in the said premises. The said Parker West was a very old and infirm man at this time, and it was well known that even if the said purchasers had any interest in the said premises that interest was comparatively worthless and must soon terminate.

V. They say that the effect of the said confiscation proceedings, if they have any bearing whatever in this cause, which your respondents wholly deny, is a matter to be determined by this honorable court.

And they further say that the rights of the creditors of said Parker West were in no manner affected by the said proceedings, the said

Parker West having departed this life pending the same; and it is certain upon the death of the said Parker West the said lands descended to his heirs-at-law, subject to the rights of his creditors at the time of confiscation, precisely as if there had been no con-
156 fiscation of the same. The said circuit court of the county of Elizabeth City is a court of general jurisdiction, and the property which is the subject of this controver y was that located within the limits of Elizabeth City county and within the jurisdiction of said court.

They deny that the decree of May 4, 1871, is absolutely null and void, and that at its date the heirs of Parker West were necessary parties to the said suit. Upon the death of said Parker West they promptly, duly, and properly became parties to said suit, as appears by the record of the same; and your respondents deny that the sales or the deeds mentioned in said 5th paragraph are null and void.

VI. They admit that the special commissioners mentioned in the 6th paragraph of said bill duly reported the sales made by them as therein alleged. It is true that Parker West died intestate, in December, 1871, leaving as his next of kin and heirs-at-law Mary E. Marrow, wife of Wm. P. Marrow, Elizabeth R. West, George B. West, and Missouri Smith, the said Mary E. Marrow, Elizabeth R. West, George B. West, and Missouri Smith being his surviving children.

These respondents cannot possibly undertake to answer as to the knowledge of the said plaintiffs or their impressions as to the legal effect of the confiscation proceedings upon their rights in said property, but they do say that at that time the general impression, almost without a single exception, so far so your respondents are advised and informed, among lawyers and counsellors whose opinions were worthy of consideration, was that confiscated property upon the death of the ancestor whose estate had been confiscated descended to his heirs-at-law, subject to the rights of his creditors existing at the time of the confiscation, as if nothing had happened; and such was the opinion of the circuit court of the county of Elizabeth City upon the rendition of the decrees complained of in the complainants' bill, and which the complainants well knew. The said complainants were fully cognizant of the fact that proceedings were pending in the circuit court of the county of Elizabeth City for the sale of said lands by and under decrees of said court, They were fully cognizant of the fact that H. C. Whiting, from whom your respondents purchased the said land now in controversy, had purchased the same from the commissioners of said court in obedience to its decrees of sale.

They further became cognizant of the fact that your respondents had purchased the said land from H. C. Whiting, paying to the said Whiting the sum of five hundred dollars per acre, as far back as the — day of September, 1873, and never once did the said complainants or any of them intimate to your respondents that
157 there was any cloud whatever upon the title to said land so purchased by your respondents as aforesaid. Three of the said complainants, viz., Elizabeth R. West, George B. West, and Missouri Smith, resided a few miles distant from your respondents.

They met each other not unfrequently, and not one word ever escaped them until just prior to the institution of the ejectment suit in the fall of 1885. The said Wm. P. Marrow and Mary E., his wife, were equally advised and informed of the said proceedings for the sale of said lands and as to the purchase made by the vendor of your respondents and their purchase from him, and yet they were as profoundly silent.

The said complainants, by their deed bearing date the 17th day of April, 1872 (a certified copy of which is filed with this bill as a part thereof), expressly referring to the sales made by the said commissioners of sale, undertook to control and direct the proceeds of sale for certain purposes expressed in said deed; and your respondents wholly deny that the said complainants have any rights whatever in the said land so purchased by them as aforesaid.

The decision in Wallach *vs.* Van Riswick was rendered in 1875, and immediately upon its rendition it became known and was fully discussed in the county of Elizabeth City. More lands in the county of Elizabeth City in proportion to its area were confiscated than in any county of the Commonwealth, and all persons who were in any way affected by the said confiscation proceedings at once became fully advised and informed as to the nature and character of said decision and as to their rights under the same.

The said complainants do not state correctly the action of C. P. Huntington in reference to his purchase of said lands. It is very certain that at this very time here spoken of in said complainants' bill the said C. P. Huntington was exceedingly anxious to purchase the land of your respondents, and was perfectly willing to take from your respondents such title as they could convey in said premises. Certainly neither he nor his agents ever questioned that your respondents' title was other than the absolute fee. The reason why the agent of the said C. P. Huntington first took an option from said parties was this: That said lands had been subdivided into very many smaller parcels, and the said C. P. Huntington was desirous to purchase the whole upon the best terms he could. He understood well that if it became known that he had absolutely purchased one or more of these parcels it would become more difficult to purchase the remainder or any part of them. Should he purchase absolutely one or two parcels his difficulties as to the purchase
158 of the remaining parcels would increase in geometrical proportion, so he adopted this method of procedure. The absolute purchase of all the lands of the Newport News farm, which he or his company now own, had been made before the said complainants executed to him their said deed of the 6th day of December, 1880.

These parties all obtained for their lands the sum of three hundred dollars per acre, whereas the said Huntington only gave the said complainants the sum of forty dollars per acre. The fact was the said C. P. Huntington contemplated expending large sums of money upon the said property, and he gave them the $8,000 to purchase his peace, not recognizing that said complainants had any valid claim to said lands.

VII. It is true that at the May term, 1872, of the circuit court of the county of Elizabeth City a decree was entered in the said consolidated causes, and that the extracts from said decree stated in the complainants' bill are true and correct extracts from the same. These respondents know nothing as to the truth or falsehood of the recitals in said decree. They are innocent purchasers for value of so much of the said land purchased by them as aforesaid without any notice of any claim whatsoever on the part of the said complainants or any other person whomsoever against the same; that your respondent, Emma D. Groome, was not the purchaser from the said special commissioners of sale in said consolidated causes, but that she purchased the said land from H. C. Whiting; the deed from the said H. C. Whiting to your respondent is filed herewith as a part of this answer, and she claims that she has the right to rely upon the recitals in said decree as of absolute and unimpeachable verity; and she further says that the said H. C. Whiting, the vendor, was wholly ignorant of any claim or pretended claim on the part of the said complainants against the said land, but, relying with the most absolute and entire confidence upon the recitals in said decree, he purchased the said land as set forth in the said record.

Your respondent says that both herself and her vendor purchased — paid the whole of the purchase-money to the said lands, the said H. C. Whiting to the credit of the cause in which the lands were sold and your respondent to the said Whiting, and received deeds for the said land before receiving any notice whatever of the plaintiffs' claims.

Your respondent, being an innocent purchaser for value without notice, and her vendor being likewise an innocent purchaser for value without notice from the circuit court of the county of Elizabeth City, she denies that her title can now in any way be questioned by reason of any recitals in the said decree, even if
159 the said recitals are not true in fact, which your respondent does not in any way admit.

Your respondent further says that the said complainants were fully cognizant of the pendency of said proceedings for the sale of said land and of the object and purposes of said sale; that they knew well at the time of the said purchase by the said H. C. Whiting that he had purchased the same; that it was likewise well known to them that your respondent had purchased the said land from the said H. C. Whiting, yet they have remained silent for more than thirteen years, never for once suggesting even the slightest objection to your respondent as to the entire legality of the said proceedings.

Your respondents are advised and informed that the said complainants in the said proceedings were represented by the said Charles K. Mallory, a counsellor of the highest character and standing. They deny the allegation that the said Charles K. Mallory appeared for the plaintiffs without authority so to do, and they demand full proof of said allegation. The said Charles K. Mallory, who at the time of the rendition of the decree now complained of was the leading counsellor in the said court, being now dead, no proper investigation after this long lapse of time can now be had of

this allegation imputing such conduct to this distinguished attorney with any regard to the rights of your respondent, who relied with entire confidence upon the records of said causes in which the said land was sold in the circuit court of the county of Elizabeth City; and it appearing from said record that the said complainants upon their own motion were admitted parties defendant to the said proceedings, and your respondents further say that the said plaintiffs having slept upon their rights for so long a period, — are now, by their own gross and unpardonable laches, estopped from setting up any claim to the said land as against your respondents.

VIII. Whilst your respondents have no personal knowledge as to the truth of the recitals in the said decree of May 4th, 1872, they are informed, believe, and so state that the late Charles K. Mallory, who was well known to the said plaintiffs and at the time an attorney of said court of the highest character and standing, appeared for and represented the said plaintiffs in said causes at the time of the rendition of said decree and continued to represent them up to the time of his death. The original of said decree, whilst not in the handwriting of the said Charles K. Mallory, was drawn at his request and upon his own dictation. The said plaintiffs knew
160 full well the said Charles K. Mallory and his utter incapacity to make any false or fraudulent representation to the court or to do them the slightest injustice.

Your respondent- further den*ies* that the said decree was a fraud upon the plaintiffs or the court, or that they are asking the court to perpetuate a fraud, but claim that they are relying upon the sanctity and verity of the solemn decrees of a court of general jurisdiction, which to them and those under whom they claim speak absolute truth, upon the faith of which they and he from whom they purchased said land acquired the same without any notice whatever or any means of acquiring such notice of the said claim on the part of the said plaintiffs; and they say that now, under the circumstances of this case, to recognize any rights in said property adverse to the rights of your respondent would be a fraud without precedent upon them.

IX. Your respondents deny the allegations set forth in paragraph 9 of the complainants' bill. It was perfectly proper, without *scire facias*, for the said plaintiffs on their own motion to have gone into the said circuit court of the county of Elizabeth City, whether by their attorney or in their own proper person, and ask to be made parties defendant in said consolidated causes, and, having done so, their act cannot now be questioned, if any verity whatsoever attaches to said record. It is unquestionably true that one of the plaintiffs, George B. West, who has resided for the last fourteen years or more upon a part of the Newport's News tract, and with whom his sisters, Elizabeth R. West and Missouri Smith, lived, purchased the very lot or parcel upon which he resided under decrees pronounced in the said causes, and accepted deeds for the same from the special commissioner of the court.

X. In response to the 10th paragraph of said bill in reference to the report of the 23d of April, A. D. 1880, of George M. Peek, special

com'r, your respondents say that it appears from the allegations of the plaintiff in said paragraph that the checks in question were drawn by the said George M. Peek in favor of these parties, as alleged in the said report, and were delivered to the said George B. West, notwithstanding the plaintiffs deny that said facts were true. Whether the said parties refused to accept them from the said George B. West or whether they were lost by him your respondents do not know. It is at least certain from the allegations of the plaintiffs' bill the said George B. West, who is now a party plaintiff to this suit, accepted his own as well as the other checks from said Special Com'r George M. Peck without objection. It is also
161 true that from the very inception of said causes the said George B. West was a party defendant therein in a fiduciary character.

XI. Your respondents admit that in the rear 1885 the said plaintiffs and Elizabeth R. West, who has since departed this life, instituted an act of ejectment against them and others, as alleged in the 11th paragraph of their bill, and in said — the plaintiffs admitted to a nonsuit.

They further admit that the court ruled that no evidence could be heard to attack or impeach the recitals in the said decree of May 4th, 1872, in any collateral suit, not deeming it necessary to pass upon the objection raised by the defendants in said ejectment suit to the competency of the plaintiffs as witnesses; and they deny that the court held that the plaintiffs in this suit had appeared in open court in proper person, if it be so intended to state in said bill. The defence in said suit based their defence upon the ground that the said decree of May 4th, 1872, being a domestic decree of a court of general jurisdiction, its recitals could not be attacked or impeached collaterally. It was mentioned by one of the counsel in argument, as an argument, that if the said recitals set forth that the said plaintiffs in this suit had appeared in proper person in said causes and moved the court to make them parties defendant to the same, then that such recital could not be impeached in a collateral suit, such was the verity attaching to domestic decrees of a court of general jurisdiction.

XII. Your respondents deem it unnecessary to answer further the allegations contained in the 12th paragraph of the complainants' bill, *she* having fully answered said allegations in a previous part of this answer, to which reference is here made.

XIII. It is true that your respondents have conveyed one-fourth of an acre, part of the said five acres in lot No. 2, to George Booker, and the same quantity of said land to George Schermerhorn.

XIV. Your respondents, as heretofore stated, did not purchase the said five acres of land from the commissioners of sale. Your respondent, Emma D. Groome, claims the absolute fee-simple title in said land, and has always so claimed since she received her deed for the same, which bears date the 5th day of September, 1873. The said H. C. Whiting did not receive his deed for said land from Com'r Peek until the 20th day of November, 1879, which deeds are filed as evidence in this cause.

If the said plaintiffs have refused to take any money now
162 on deposit to the credit of said consolidated causes their refusal to do so, your respondents respectfully submit, can in no manner affect their title to said land purchased and paid for by them as aforesaid.

The allegations and denials of this answer referring only to the plaintiffs in this cause, your respondents here repeat all such allegations and denials, and include therein Elizabeth R. West, who is now dead, so far as they refer to the conduct and knowledge of the plaintiffs in and about the proceedings in said consolidated causes, or thereafter up to the period of her death, in the month of ——, A. D. 1885.

And now, having fully answered the complainants' bill, they pray to be dismissed hence with their reasonable costs.

C. F. GROOME.

VIRGINIA, }
Elizabeth City County, } *To wit:*

On the 14th day of May, 1886, personally appeared before me the above-named C. S. Groome and made oath that he had read the above answer subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters that may be therein stated to be on his information and belief, and as to those matters he believes it to be true.

S. E. BICKFORD,
Clerk Circuit Court Elizabeth City County.

Supplemental Answer of Alfred P. Thom, Trustee. Filed by Leave of Court.

The amended answer of Alfred P. Thom to the bill of complaint exhibited against him and others in the circuit court of the county of Warwick by William P. Marrow and Mary E., his wife, George B. West, and Missouri Smith.

This respondent, answering, without waiving his demurrer filed in this cause, and reserving to himself the benefit of all just exceptions to the said bill, for amended answer thereto, or so much thereof as he is advised it is material that he should answer, answers and says—

1st. That he here repeats his original answer in this cause.

2d. That it appears from the answer of John S. Tucker, filed herein since this respondent's original answer was filed, or from Exhibit "A A," filed herewith, that in addition to the undivided one-half interest in the land mentioned in this respondent's original answer he is interested as a lienholder upon the other
163 undivided one-half interest thereof to the extent of $1,377.43, with interest thereon from July 1st, 1883.

That said indebtedness was assigned to this respondent by deed of John B. Whitehead and wife, dated April 9th, 1885, mentioned in his original answer in this cause; that he received such assignment

and accepted said trust and entered upon the discharge of his duties as trustee under said deed April 9th, 1885, and has ever since continued and now continues in the discharge thereof, and at the time of the acquisition of the same this respondent had no knowledge or notice whatever of any claim on the part of the plaintiffs or any of them to the land in controversy or any part thereof, and never heard thereof until long subsequent to said date; and he alleges that he is a purchaser thereof for value and without notice of any claim on the part of the said plaintiffs or any of them.

ALFRED P. THOM, *Trustee.*

TUNSTALL & THOM, *P. D.*

Depositions of Jno. B. Whitehead, A. P. Thom, Jno. S. Tucker, and Richard B. Tunstall.

Counsel for defendants, in introducing as a witness John B. Whitehead, hereby expressly disclaim any waiver of their exceptions taken to the competency of the plaintiffs or any of them as witnesses in this cause. On they contrary, they reserve all such exceptions and the benefit thereof, the examination of this witness being subject to the decision of the court in that regard and not to be used if said plaintiffs are held to be incompetent.

JOHN B. WHITEHEAD, a witness introduced on behalf of the defendants, being first duly sworn, deposed and said:

Q. 1. What is your name, age, and residence?

A. John B. Whitehead; 63 years; Norfolk, Va.

Q. 2. Are you the same John B. Whitehead who was the purchaser jointly with John S. Tucker of certain real estate at Newport News, now in Warwick county, Virginia, but then in Elizabeth City county, Virginia, in the chancery suits then depending in the circuit court of Elizabeth City county between Joseph B. Brinkley and others and Parker West and others and the other causes consolidated with that?

A. I am.

Q. 3. Did you at the time you made such purchase have
164 any knowledge or suspicion of any difficulty about the title of the property so purchased?

A. No.

Q. 4. Did you ever have any knowledge or did you ever hear any reports at the time of such purchase of any adverse claims set up by the heirs of Parker West to that property?

A. Never.

Q. 5. When did you first hear of any claims made by these heirs to the property in question or any interest in it?

A. I cannot name the exact date, but I have a letter here from the attorney in Hampton, Va., whom I wrote to on the subject as soon as I received notice of any trouble, that will give the approximate date. It must have been in the latter part of June, 1881, or early in July, 1881, as I wrote to Col. Tabb, in Hampton, to look into the matter, and I have his letter, dated July 8th, 1881, acknowledg-

ing the receipt of my letter, in which he says he will take pleasure in appearing as my counsel in the suit alluded to by the West heirs. That was the first intimation that I had of any trouble at all. It was either in the latter part of June or in July. I presume it must have been in July, for I probably wrote the very moment I received the notice.

Q. 6. You are confident, then, and state it as a fact that you never heard of any claim put forward by the West heirs or any of them in reference to this property prior to the month of June, 1881?

A. To the best of my knowledge, that was the first intimation I ever had of any trouble at all or any doubt as to the validity of my deed or of any claim made by them.

Q. 7. It appears from the record in this case that you received your deed in the year 1880, and I understand that at that time you had never in any way heard of any hostile or adverse claim on the part of the West heirs?

A. Never. If I had I would not have made the deferred payment until I had examined into the matter, and I made all payments prior to the receipt of the said deed. This applies to payments for the whole interest in the 20½ acres both for Tucker and myself.

Q. 8. Have you, in confidence of your perfect title, refused offers that have been made for the property in question?

A. Yes, sir; several.

Q. 9. Will you mention the amount of one or two of those offers?

A. I had an offer made me once of twenty thousand dollars and I had an offer made once of three hundred dollars an acre, and on several other occasions I have been approached to know what
165 I would take for the property, and I have declined naming any price, as I was in no hurry to dispose of it, looking upon its future advancement. When I bought the property there was but one habitation in sight of it, and I rented it out to a man just to take charge and keep the weeds down for a number of years, and really it was considered that I had given a big price for it at the time by some persons.

Q. 10. Since then has the terminus of the Chesapeake and Ohio railroad been established near it on the same general tract of land?

A. Yes, sir; in the same general vicinity adjacent to this property.

Q. 11. Is the value of this property very much advanced by that fact?

A. By that alone, for otherwise the land is not worth twenty dollars an acre for agricultural purposes.

Q. 12. Have you always, since it became certain that the terminus of the railroad would be established there, regarded this property as a valuable part of your estate and worth vastly more than the price you gave for it and interest?

(Question objected to as irrelevant.)

A. Yes, sir

Q. 13. And is its market value, in fact, very much greater since the time referred to?

A. Certainly; but for the terminus of the Chesapeake and Ohio

railroad there I would at any time have been willing to sell the property at what it cost, with interest. I originally purchased it believing that in course of time (eight or ten years), on account of its geographical position, some work of internal improvement would terminate at that point; that was my inducement for the purchase.

Cross-examination:

C. Q. 1. Did you purchase this property privately or at public sale?

A. I purchased it privately on the ground from the commissioner, who, with Capt. Tucker and myself, was riding out for pleasure; and when I expressed the opinion as to the proper future value of that property the commissioner stated there was a portion of it for sale and could be purchased, and from my asking him the price and he naming it I considered the matter, and when we returned to Hampton I purchased it for the benefit of myself and Capt. John S. Tucker. The commissioner was Mr. Charles K. Mallory. We
166 started out for a pleasure ride without any idea of visiting that place. We merely visited Capt. Taylor's place and some others to see the countrry, without any view of purchasing, as we had been spending a day or two in Hampton with Col. Mallory.

C. Q. 2. Did you have the title investigated?

A. No, sir.

C. Q. 3. Did you at any time subsequently to the purchase?

A. Never. Purchasing it from the commissioners, I took it for granted the title was good.

C. Q. 4. Did you know, or was it called to your attention, that this property in question was property that had been confiscated by the Government?

A. No, sir; I really did not know whose property it was, except that it was for sale by a commissioner of court. I did not know who the previous owners were till subsequent to the purchase.

C. Q. 5. Did you receive from the attorneys of the West heirs a letter some time in 1885 offering to refund to you your purchase-money, with interest, if you would release your title and claim to the land?

A. I do not recollect whether from the heirs, but either from them or from Burroughs & Brother, I received such a letter. I am under the impression that it was from Burroughs & Brother.

C. Q. 6. Do you recall having any correspondence or conversation with Mr. George M. Peek concerning the sale of this tract of land after your purchase?

A. I do not think I ever met with Mr. Peek until, probably, after the proceedings were instituted. I cannot recall any conversation I ever had with Mr. Peek. I do not think I ever met him more than two or three times—once about 15 years ago and probably after the suit was instituted. I may have asked him something about it. I never had any correspondence with any one except with Col. Tabb, who was my attorney.

C. Q. 7. Do you refer to this ejectment suit of last year?

A. No, sir; I don't think I have seen Mr. Peek for five years.

Redirect examination:

R. D. Q. 1. As I understand you, in buying that property you trusted implicitly to the validity and correctness of all the court proceedings; is that true?

A. Certainly I did. I naturally presumed that it was all correct; that the title was proper, and that the proceedings of court were all in due form.

R. D. Q. 2. You have been asked on cross-examination whether you had the title examined at the time the purchase was
167 made. Please state whether, in the year 1881, you employed counsel, and what was his opinion as to the validity of your title to the property.

(Question objected to by counsel for the plaintiffs.)

A. I did employ counsel in 1881 and he gave me every assurance that, in his opinion, my title was perfect, and he repeated it again in a letter of May 6, 1882.

Recross-examination:

R. C. Q. 1. Please state who the counsel was.

A. Col. Thomas Tabb.

And further this deponent saith not.

JNO. B. WHITEHEAD.

The Deposition of Alfred P. Thom.

Present: Richard Walke, counsel for defendants, and John J. Burroughs, counsel for plaintiffs.

Counsel for defendants, in introducing Alfred P. Thom, hereby expressly disclaim any waiver of their exceptions taken to the competency of the plaintiffs or any of them as witnesses in this cause. On the contrary, they reserve all such exceptions and the benefit thereof, the examination of this witness being subject to the decision of the court in that regard and not to be used if said plaintiffs are held to be incompetent.

ALFRED P. THOM, a witness produced on behalf of the defendants, being duly sworn, deposes and says:

Q. What is your name, age, occupation, and residence?

A. Alfred P. Thom; 31 years; lawyer; residence, Norfolk, Va.

Q. 2. Are you the trustee in the deed of assignment made by John B. Whitehead for the benefit of his creditors?

A. Yes.

Q. 3. Is that deed of assignment an exhibit with the answer filed by you in this cause?

A. Yes; a copy of it is.

Q. 4. Is the Whitehead interest in the Newport's News land embraced in that deed of assignment?

A. Yes.

168 Q. 5. I mean the Whitehead interest, which is a part of the subject of controversy in this suit?

A. Yes; he conveys to me in that deed an undivided one-half interest in the twenty and one-half acres that constitute lot number 8 mentioned in plaintiffs' bill; and he also assigns to me a debt which is a lien on the other half interest, amounting to $1,377.43 and interest, and which is specifically mentioned in Exhibit "A A," filed with the answer of John S. Tucker in this cause.

Q. 6. What is the date of that deed of assignment and when did you take possession of under and enter upon the duties of your trust?

A. All on the 9th day of April, 1885.

Q. 7. Now, please state whether you had any knowledge, information, or notice of any kind of any adverse claim on the part of the West heirs against either the Whitehead or Tucker interest in the Newport's News land in question at the time of that deed.

A. None whatever; I never heard any such information until long subsequent thereto.

Q. 8. Had you at the time of that deed ever heard any rumors of any sort to that effect, or had you any suspicion of any sort to that effect?

A. None whatever.

Q. 9. How is this interest in the Newport's News land regarded by you—as an asset of much value or not?

A. It is regarded by me as an asset of very great value. The whole of the twenty and one-half acres is worth at least forty thousand dollars, and I have given instructions to an agent in whose hands the property is to obtain offers for the sale not to accept, without communicating with me, as little as forty thousand dollars for it. I will add that the debts secured by the deed of assignment are very large, and it will require, I am convinced, a greater value on this property than forty thousand dollars to provide for their payment.

Q. 10. About when did you first hear of these claims of the West heirs?

A. My recollection is that I heard of them either through a letter addressed to Mr. John B. Whitehead and myself by Messrs. Burroughs & Bro., as attorneys for the West heirs, in the fall of 1885, or about that time. I can say that I first heard of them just prior to the ejectment suit, which was brought in the fall of 1885, and which is mentioned in the plaintiffs' bill as being dismissed by them upon the trial, they taking a nonsuit.

And further this deponent saith not.

ALFRED P. THOM.

169 It is agreed between counsel on both sides that the deed of assignment to Alfred P. Thom, trustee, dated April 9, 1885, and referred to in his testimony, is to be considered as proved and in evidence, and a copy of the same is hereby filed as Exhibit "A B," and is admitted to be correct.

The Deposition of John S. Tucker. June 4, 1886.

Counsel for defendants, in introducing as a witness John S. Tucker, hereby expressly disclaim any waiver of their exceptions taken to the competency of the plaintiffs or any of them as witnesses in this cause. On the contrary, they reserve all such exceptions and the benefit thereof, the examination of this witness being subject to the decision of the court in that regard and not to be used if said plaintiffs are held to be incompetent.

JOHN S. TUCKER, witness produced on behalf of the defendants, being first duly sworn, deposes and says:

Q. What is your name, age, occupation, and residence?

A. John S. Tucker; 48 years; lawyer; Washington, D. C.

Q. 2. Are you the John S. Tucker who purchased jointly with John B. Whitehead the Newport's News land, which is a part of the subject-matter in controversy in this suit?

A. I am.

Q. 3. Please state whether or not you had any knowledge, information, or notice of any kind at the time of your purchase of any adverse claim to said lands on the part of the heirs of Parker West or any of them?

A. I had not.

Q. 4. The deed which was made to Mr. John B. Whitehead was made in March, 1880. Please state whether or not at the time of that deed you had any knowledge, information, or notice of any kind of any adverse claims on the part of the said West heirs or any of them.

A. I had not.

Q. 5. State whether or not you had heard any rumors of any such claims or had any suspicion of any such claims.

A. I had not.

Q. 6. Now, will you please state when you first heard of those claims asserted by the West heirs—when or about when?

A. About the time the suit was brought by the heirs—just after that time.

Q. 7. Can you state from your recollection about what time that suit was brought?

A. Some time in 1881.

170 Q. 8. Was that the chancery suit which was dismissed by the West heirs?

A. So I have been informed; it was the first suit that was ever brought, to my knowledge, and it was dismissed, as I was informed by our counsel at that time, Mr. Tabb. I know it never came to a head.

Cross-examination:

C. Q. 1. With whom did you negotiate in making the purchase of the land?

A. Mr. Charles K. Mallory and Mr. Peek were commissioners of sale. My, or our, negotiation was with Col. Mallory.

C. Q. 2. Were your negotiations with him individually or as special commissioner?

A. As special commissioner.

C. Q. 3. Did you know the name of the suit in which he was special commissioner?

A. I did at the time. I do not now.

C. Q. 4. Did you make any examination of the record in that suit?

A. None whatever.

C. Q. 5. Did you employ any attorney to make an examination of the record in that suit?

A. None.

C. Q. 6. You then, as I understand, had no knowledge whatever of the condition of the record in the suit?

A. Nothing except what Col. Mallory told me. I had the greatest confidence in his statements. He was a good lawyer and my personal friend.

C. Q. 7. Did you or not know that this land was what was called confiscated land?

A. I did not at the time we purchased it.

C. Q. 8. When did you first learn that it was confiscated land?

A. That I cannot say. I heard rumors after that time that some proceedings had been taken to confiscate it, but the court in this suit having decided to sell it I presumed that everything was all right.

C. Q. 9. Did you hear those rumors about the confiscated land prior to 1880?

A. O, yes.

C. Q. 10. Did you hear it prior to 1876?

A. No; I do not think I heard it prior to that time.

C. Q. 11. After 1876 did you hear of any discussion of the case of Wallach *vs.* Van Riswick as likely to affect titles to confiscated land?

A. No.

And further this deponent saith not.

JOHN S. TUCKER.

171 It is agreed between counsel on both sides that the deed from John B. Whitehead and wife to John S. Tucker, referred to in the testimony of John S. Tucker, shall be considered as proved and in evidence, and a copy of the same is herewith filed, marked Ex. "C D," and is admitted to be correct.

(The Exhibit "C D" not in the papers.—Wm. A. Winston, copyist.)

The Deposition of Richard B. Tunstall. June 4th, 1886.

Counsel for defendants, in introducing as a witness Richard B. Tunstall, hereby expressly disclaim any waiver of their exceptions taken to the competency of the plaintiffs or any of them as witnesses

in this cause. On the contrary, they reserve all such exceptions and the benefit thereof, the examination of this witness being subject to the decision of the court in that regard and not to be used if said plaintiffs are held to be incompetent.

RICHARD B. TUNSTALL, a witness produced on behalf of the defendants, being first duly sworn, deposes and says:

Q. 1. What is your name, age, occupation, and residence?

A. Richard B. Tunstall; age, 37 years; lawyer; residence, Norfolk, Va.

Q. 2. Are you the Richard B. Tunstall, trustee, in whose favor a lien is reserved for the amount of $1,162.22 in the deed from John B. Whitehead and wife to John S. Tucker of December 4th, 1885?

A. I am.

Q. 3. Please state, as trustee, for what or for whom that lien is reserved to you.

A. As trustee for the creditors of the Franklin Savings Bank. I was made trustee for such creditors by a deed of assignment from the Franklin Savings Bank to me as trustee, bearing date on the 3d of April, 1885, and that is the time when I entered upon the discharge of my duties under that deed.

Q. 4. Please state whether, at the time of that deed of assignment to you just mentioned, you had any knowledge, information, or notice of any kind of any adverse claims on the part of the West heirs or any of them against this Newport's News land in question.

A. Absolutely none.

Q. 5. Had you ever heard any rumors to that effect, or had you any suspicion whatever of any such claims?

A. None at all.

And further this deponent saith not.

RICH'D B. TUNSTALL.

172 It is agreed between counsel on both sides that the deed of assignment from the Franklin Savings Bank to R. B. Tunstall as trustee, dated April 3d, 1885, and referred to in his testimony, shall be considered as proved and in evidence, and a copy of the same is herewith filed, marked Exhibit "E F," and is admitted to be correct.

(Exhibit "E F" not found.)

The Deposition of George B. West. June 7, 1886.

Mr. Richard Walke, of counsel for the defendants, excepts to the competency of the witness, Mr. George B. West, on the same grounds hereinbefore set out on his previous examination in this cause, to which the said counsel refers for a statement thereof.

The witness, GEORGE B. WEST, being first duly sworn, deposes and says:

Q. 1. Mr. W. S. Howard, a witness for the defendants, stated that

after the death of Parker West you subsequently visited the office of Mr. C. K. Mallory on business appertaining to the sale of Newport's News lands as your attorney and as attorney for the heirs. Did you at any time between the death of your father and the entering of the decree at the May term, '72, visit the office of Mr. Mallory as your attorney or as attorney for the heirs?

Ans. I did not. I was not authorized by any of the heirs to consult Col. Mallory as to the sale of the land. I probably saw Col. Mallory in reference to the collection of the rents of the lands that were not sold, visiting him as a commissioner and not as an attorney. The lands not sold were the Casey tract, Pumpkin Hall tract, and some lots in Hampton.

Q. 2. Did you do any act or have any conversation with Col. Mallory between the date of the death of your father and the entering of said decree at the May term, '72, authorizing him to act as your attorney or as attorney for the heirs of Parker West?

Ans. I did not. I never spoke to Col. Mallory in reference to acting for us in such a capacity either before or after the death of Parker West.

Q. 3. Mr. George M. Peek, another witness for the defendants, after stating in detail what transpired at the interview at Mrs. Stores, in Hampton, between your sister, yourself, and himself, further on in his testimony says that he *thinks* that he told you that Col. Mallory represented you and your sister in those cases.
173 Did he call your attention to this fact or make any reference to Col. Mallory in that conversation?

Ans. I am sure he did not. Had he done so my sister and myself would have discussed the matter afterwards. I never heard of Col. Mallory representing us until within the last year.

(NOTE.—Mr. Richard Walke, of counsel for the defendants, here excepts to all the questions asked the witness in the above direct examination, not only on the ground of his incompetency as a witness, already taken, but because it is sought by his evidence to impeach the truth of the record in the consolidated causes of Brinkley *vs.* Latimer and West and Peek *vs.* West, &c., and for other ground; and it was agreed between counsel upon both sides that this exception might be taken here at the close of the direct examination instead of to each question as propounded to the witness.)

Cross-examination:

(Without waiving any of the exceptions heretofore taken.)

Q. 1. I do not understand you, Mr. West, to deny that you were frequently in Col. Mallory's office after the death of your father and prior to as well as after the decree of May, 1872.

Ans. I was probably there three or four times; I do not remember the times.

Q. 2. Do you mean that you were probably there three or four times between the death of your father and the decree of May, 1872?

Ans. I mean that I was there three or four times between the death of my father and the death of Col. Mallory.

Q. 3. I have understood you to admit that you were in Col. Mallory's office between the death of your father and the decree of May, 1872. Was not that so?

A. I am sure I saw Col. Mallory in this interval, but do not know whether in his office or not.

Q. 4. Are you not sure that you saw and conversed with him several times at least during that interval?

Ans. I am not sure.

Q. 5. Do you not think it probable?

Ans. I do not think it very probable. I conversed with him more than once or twice.

Q. 6. Did you not know that the Newport's News land, afterwards bought by Whitehead and Tucker, was in the hands of Col. Mallory and the other special commissioners for sale?

Ans. I knew it was for sale, if it had not already been sold.

174 Q. 7. You mean that you did not know then whether it had been sold or not?

Ans. I do mean so.

Q. 8. Did you enquire whether it had been sold or not?

Ans. I did not; I never spoke to Col. Mallory about the sale of any of the land except my own purchase.

Q. 9. Was your purchase a part of the Newport's News tract?

Ans. It was.

Q. 10. You have stated in your answer to question 1 in your direct examination that you probably saw Col. Mallory in reference to the collection of the rents of the Casey tract, the Pumpkin Hall tract, and some lots in Hampton. Were the special commissioners collecting the rents of those lands; and, if so, what was done by them with such rents?

Ans. They were not collecting; they allowed me to collect the rents.

Q. 11. What, then, would be your object in seeing Col. Mallory about collecting the rents of these lands?

Ans. All the lands of my father were in the hands of commissioners for sale, and I saw Col. Mallory because I wanted to know whether we could get the rents or not.

Q. 12. Had you not been collecting those rents before then?

Ans. I had, for my father, but supposed when the lands were put in the hands of commissioners there was a doubt whether we were entitled to the rent.

Q. 13. But those lands were in the hands of the commissioners long before your father's death, were they not?

Ans. They were not. I think they were put in the hands of the commissioners the year that he died.

Q. 14. But do you not know that your father's property generally was in the hands of the commissioners some considerable time before he died, and long enough to enable them to make many sales of parts of it?

Ans. It was only about six months, I think.

Q. 15. And during your father's lifetime you collected the rents in question?

Ans. I did.

Q. 16. In the conversation with Mr. Peek, referred to in question 3 of your direct examination, did not Mr. Peek inform you and your sister that you and the other heirs were parties to the suit in which the land in question was sold?

Ans. He did, but we denied it.

Q. 17. What steps, if any, did you take to find out whether you had been made parties and how and by whom you had been made parties?

Ans. We did not take any steps. We knew that no sum-
175 mons had been served on us and had no idea that any one represented us, having never employed any one to represent us.

Q. 18. Then you did not enquire of Mr. Peek who represented you, and you made no enquiry upon the subject?

Ans. I have no recolleetion of making an enquiry of Mr. Peek, and I am sure I never afterwards made an enquiry. I probably asked Mr. Peek how we were made parties, having never had a summons, and I am sure he never said that Mr. Mallory represented us.

Q. 19. And you did not apply after that conversation with Mr. Peek to any lawyer or to the clerk of the court, or examine the record in the suit for yourself, for the purpose of finding out how you had been made parties?

Ans. I did not, until I employed the present counsel.

Q. 20. When was that?

Ans. I suppose last year.

Q. *20.* You have stated in your answer to the third question on your direct examination that you never heard of Col. Mallory representing you and the other heirs until within the last year. Please state at what time within the last year you so heard it.

Ans. I think it was last December, at the trial of the ejectment suit.

Re-examination:

Q. 1. Is it not true that the conversation had with Mr. Peek was in 1876, some four years or more after the lands had been sold and the sales confirmed?

—. I think it was. It was after the decision of the Supreme Court in Washington in case of Wallach *vs.* Van Riswick.

And further this deponent saith not.

GEO. B. WEST.

Mr. S. E. BICKFORD, witness for the plaintiff, being duly sworn, testifies as follows:

1st Question. Please state your name, residence, and occupation.

1st Answer. S. E. Bickford; Hampton, Va.; clerk of Elizabeth City county courts.

2d Question. How long have you been clerk of said courts?

2d Answer. Since the 1st of July, 1875.

Question 3. Have you the original process book of the circuit court of Elizabeth City county, including the year 1870 to the present time?

Answer 3. I have the rule book since 1875; I have also in my office the rule book used previously to my coming in office.

176 Question 4. Please examine the rule book for the year 1870 and state if you find there record of two suits brought to August rules, the one in the name of Joseph P. Brinkley against Thomas Latimer and others, the other in the name of Jno. L. Peek against Parker West and George B. West, trustees.

Answer 4. I do.

Question 5. Does the said book anywhere show any return made of service of process upon any of the defendants?

Answer 5. It does not.

Question 6. Is there any other book in your office showing any return of process executed upon any of the defendants in the above causes?

Answer 6. There is none.

Question 7. Please state how this book is marked on the back.

Answer 7. Chancery rule docket, circuit court.

Question 8. Is there anything in this book or in any other book in your office showing that any *scire facias* was ever issued or returned reviving the suits above mentioned against the heirs of Parker West?

(By COUNSEL FOR THE DEFENSE: The above questions and answers are objected to, being entirely irrelevant to the issues involved in this controversy, and for other apparent reasons.)

Answer 8. I do not know of any.

Question 9. Are you familiar with the papers in the above causes?

Answer 9. I am.

Question 10. Is there any paper in the said cause, issued by the clerk of any court, showing that any *scire facias* was ever issued to to revive the said suit against the heirs of Parker West?

(Objected to for the reason that the record shows how these parties became parties to the suit, and the record is the best evidence.)

Answer 10. I have not seen any.

Question 11. Please examine the decree of May 4, 1872, in said causes, and state in whose handwriting it is.

Answer 11. Mr. George M. Peek's.

Question 12. There is a statement in said decree "that Geo. M. Peek do check for the further sum of two hundred dollars, being the amount allowed the said G. M. Peek by the heirs of the said Parker West, as appears by written consent of council, for extra serv-

177 ices," &c. Please examine said decree and state what part of the above sentence is interlined.

Answer —. The words "as appears by written consent of council,"

and I think it is in a different handwriting—the handwriting of Mr. Holt, clerk of the court at that time, I think.

Question 13. Have you ever seen in the papers in this cause the paper referred to?

Answer 13. No, sir.

Question 14. Have you at the requests of plaintiffs and plaintiffs' counsel made diligent search for said paper?

Answer 14. Yes, sir.

Question 15. Were you one of the purchasers of part of Newport News property?

Answer 15. I was. (I did not purchase of the commissioner.)

Question 16. Did you make sale; and, if so, to whom — the property so purchased, and about what time?

(Question and answer objected to for the reason that they can in no manner affect the rights of the parties to this controversy, and for other reasons.)

Answer —. I did. I sold to C. P. Huntington, either in 1880 or '81; he was to give $300.00 per acre.

Question 17. Was there at that time some question about the title to this property, growing out of the claim set up for the same by the heirs of Parker West?

Answer *18*. I was informed that there was.

(Objected to because it is hearsay testimony.)

Question 18. In your negotiations with Mr. Huntington was not a part of the purchase-money retained or kept back to await the decision upon this title?

(Question objected to because it is irrelevant to the matters involved in this controversy.)

Answer 18. I think there was.

Question 19. Did Mr. Huntington about that time purchase from a number of gentlemen certain parts of this Newport News tract?

(Question objected to for irrelevancy.)

Answer 19. He did.

Question 20. Was there taken from the purchasers what is known as an option?

(Same objection made.)

178 Answer 20. Yes, sir.

Question 21. Will you furnish, if you can find it, one of those papers known as an option?

(Same objection as above.)

Answer 21. I will.

Question 22. Is it not true that Mr. Huntington has retained from you and others part of the purchase price of the property sold to him by you and others?

(Same objection.)

Answer 22. Yes, sir; he retained from me between $265.00 and $275.00 out of a total of $1,800.00; about $25 was for taxes and balance was on account of defect of the title.

Question 23. Does he still retain this?

(Same objection.)

Answer —. Yes, sir.

Question 24. I understand you to say he retained from other purchasers certain portions of the purchase-money as well as yourself?

(Same objection, and if he obtained it from others we want to prove it by the parties themselves, if it is relevant.)

Answer 24. Yes.

Question 25. Was there a good deal of property confiscated in Elizabeth City county?

(Same objection—irrelevancy.)

Answer 25. Yes, sir.

Question —. After the decision of the Supreme Court of the United States in the case of Wallach *vs.* Van Riswick, in 1876, was not the question of the title to confiscated property and the rights of the heirs of those whose property had been confiscated a subject of frequent conversation—a matter generally discussed by those who were interested in such matters in the county of Elizabeth City?

Answer *25*. It was.

The counsel for the defence, not waiving their objections heretofore taken, proceeded to cross-examine the witness as follows:

Question 1. When did you first become clerk?

Answer 1. July 1, 1875.

179 Question 2. From 1866 to 1875 how many clerks have there been of the circuit court of Elizabeth City county?

Answer 2. Five.

Question 3. Were not the books in the clerk's office prior to the assumptions of your duties of the office very imperfectly and unsatisfactorily kept?

Answer —. With the exception of Mr. Howard's books, I think they were.

Question 4. Have not the papers in these consolidated causes of Brinkley *vs.* West and Peek *vs.* West, &c., been frequently handled by many parties and not infrequently taken from the office during the last 7 or 8 years?

Answer 4. Yes, sir.

Question 5. When you were approached by the agent of Mr. C. P. Huntington to purchase your land in 1881, when he first sought to get your option, did he raise any objection to your title?

Answer 5. No, sir.

Question 6. Was he not exceeding anxious to buy yours and everybody else's who had any interest there?

Ans. 6. Yes, sir.

Question 7. When you executed a deed what was the general character of the deed; was it a general warranty deed or was it not?

(Objected to, as the deed is the best evidence.)

Ans. 7. I feel sure it was a deed of general warranty.

Question 8. Was it not a fact that you heard no objection on the part of Mr. Huntington's agent to the title of the land you had sold him until about the time of the maturity of the last payment of the purchase-money due to you?

Answer 8. Yes, sir.

Question 9. Do you know when this last payment fell due?

Answer 9. I don't remember.

Question 10. How much land did you sell Mr. Huntington?

Answer 10. Six acres.

Question 11. You say, in answer to the 24th question, that "Mr. Huntington retained from the purchasers certain portions of the purchase-money." Do you not know that a large number of the purchasers received the whole of the purchase-money?

Answer 11. No, sir.

Question 12. From how many of the purchasers did he retain portions of the purchase-money, how much did he retain, how much land did each of these parties sell him, and what was the pay per acre?

180 Answer 12. I don't know; the general price was $300 per acre.

Question 13. How long have you been living in the county of Elizabeth City? Was not this land at the time you purchased it in the county of Elizabeth City, and were you not generally informed as to all matters of importance transpiring in the county?

Answer 13. Twenty-three years; it was; I suppose I was.

Question 14. From whom did you buy the land you sold Mr. Huntington?

Answer 14. Mr. Darling and I bought together one-half of the Tennis tract, of which I took 6 acres and he took 14.

Question 15. Did not Mr. Darling sell to Mr. Huntington this 14 acres? Did he not get the whole of his purchase-money, $300 per acre?

Answer 15. He informed me that he made the sale and that he got his money.

Question 16. Has Mr. Huntington ever made any claim against Mr. Darling to refund any part of this money?

Answer 16. Not that I know of.

Question 17. Is not Mr. Darling one of the most responsible men, pecuniarily, in Elizabeth City county?

Answer 17. Yes, sir.

(Witness is requested to produce and file with this deposition the date of his original purchase of the land sold by him to Mr. Hunt-

ington and copies of all papers between him and Mr. Huntington referring to the purchase.)

Re-examined:

Question 1. You have been asked how many clerks of the court there were from 1866 to 1875; will you please state how many clerks of the court of Elizabeth City county there were from August, 1870, to July, 1875?

Answer 1. Five.

Question 2. In whose handwriting is the record in the process book of the suits Brinkley *vs.* Latimer and others, and Peek *vs.* West?

(Objected to for irrelevancy and immateriality.)

Ans. 2. W. S. Howard, clerk.

Question 3. Please state in full the names of the parties, plaintiffs and defendants, as they appear on this process book?

(Same objection.)

181 Ans. 3. Jos. B. Brinkley, plaintiff, against Thomas Latimer, Parker West, C. W. Hickman; William L. Howard, trustee and in his own right; James E. Turner, trustee; John Latimer, W. R. Willis and Jane C., his wife; Linda Godwin, Lelia Godwin (infant), John A. Curtis, and —— ——, assignee of said J. A. Curtis, a bankrupt, defendants; and the next suit is John L. Peek, plaintiff, against Parker West and George B. West, trustee, defendants.

And further this deponent saith not.

S. E. BICKFORD.

Mrs. MARY E. MARROW, a witness for the plaintiffs, being duly sworn, testifies as follows:

Counsel for the defence here asks the counsel for the plaintiff whether the witness is the same Mary E. Marrow who is one of the plaintiffs in this suit and the wife of Wm. P. Marrow, another plaintiff in this case. Counsel for the plaintiffs answers that she is.

Note by counsel for the defendants.—The defendants object and except to the competency of the witness on the following grounds:

1. Because Charles K. Mallory, who was one of the original parties to the contract or other transaction which is the subject of investigation, is dead, and, unless this fact be admitted by counsel for the plaintiffs, we offer now to prove it.

2. Because the husband of the witness is a party to this suit and interested in the controversy, and the result of the witness' testimony must be for or against her husband.

3. Because of the death of Miss Elizabeth R. West.

4. Because Jos. B. Brinkley is dead, which fact defendants offer to to prove, if necessary.

5. For other apparent reasons.

Counsel for plaintiffs replies that he admits the death of Charles K. Mallory, but he does not admit, but denies, that Charles K. Mal-

lory was one of the original parties to the contract or the transaction which is the subject of investigation, and there is no evidence, oral or written, to support or maintain any such supposed case.

2. The property in controversy, or a part of the same, being under the laws of Virginia the property of Mrs. Mary E. Marrow, as one of the heirs of her father (and not the property of her husband), she is a competent witness.

3. No recovery is sought against J. B. Brinkley or his estate, and his debts have been fully paid and satisfied.

182 Defendants, by counsel, call attention to the pleadings in this cause, which put direct in issue the question of the said Charles K. Mallory's being authorized and employed by the plaintiffs to represent or appear for them in the consolidated causes, and will at the proper time prove that he was one of the original parties to the transaction which is thus brought in question.

Plaintiffs, by counsel, deny that the pleadings put in question any such issue, and that the name of Charles K. Mallory does not appear in the plaintiff's bill, except where he is referred to as one of the special commissioners in the suits of Brinkley *vs.* Latimer and Peek *vs.* West.

Question 1. Please state name, residence, and age.

Ans. Mary E. Marrow; Richmond, Va.; age, 55 years.

Question 2. When did Parker West die?

Ans. In December, 1871.

Question 3. Who are his heirs?

Ans. Mary E. Marrow, E. R. West, Geo. B. West, and Missouri P. Smith. Elizabeth R. West died in October, 1885, unmarried and without any will.

Question 4. At August rules, 1870, suit was commenced by J. B. Brinkley against Thomas Latimer, Parker West (your father), and others, and at the same rules another suit was instituted by John L. Peek against Parker West and Geo. B. West, trustee. Were you made a party to those suits?

(Objected to on the ground that the record is the best evidence, and if this be an attempt to contradict the records we object to it on that ground also.)

Ans. No, sir; I was not.

Question 5. Was any writ, process, or paper of any kind served upon you notifying you of these suits or summoning to appear?

(Same objection, and for the additional reason that it is immaterial.)

Ans. No, sir.

Question 6. Did you ever at any time employ counsel to defend or protect your interests in these suits?

(Same objection.)

Ans. I did not until my recent employment of Burroughs & Bro.

183 Question 7. On the 4th of May, 1872, a decree was entered in the said causes, which I will now read to you. (Here decree reciting that the heirs of Parker West were made parties to said causes on their own motion was read to witness.) Is it true that you appeared in person or with your sisters and their husbands and made a motion to become party defendant to said causes?

(Question *6* objected to on the ground that the record is the best evidence, and it is immaterial whether she appeared in person or by attorney, and if the idea be to vary or contradict the record question also objected to on that ground.)

A. I did not. It is not true.

Question 8. Where were you living in May, 1872?

Ans. Richmond, Va.

Question 9. Were you in the court-house of Elizabeth City county on the 4th day of May, 1872?

(Objected to for the reasons previously given.)

Ans. I was not.

Question 10. Where were you on that day?

Ans. In the city of Richmond, Va.

Question 11. Did you authorize any attorney to make any such motion or any other motion for you on that day or any other day in these causes?

(Same objection.)

Ans. I did not.

Question 12. Is the recital contained in said decree, in so far as it undertakes to make you a party to said causes by appearing in person or by attorney, without foundation and utterly false?

(Same objection, because it is an effort to contradict the record.)

Ans. It is.

Question 13. Was any order, notice, writ, process, or paper of any kind or description served upon you suggesting the death of your father, Parker West, and commanding you to show why the said suits should not be revived and proceed against you and his other heirs?

(Objected to because immaterial.)

Ans. There was not.

184 Question 14. Did you learn that there was such a decree as that of May 4, 1872, until you had employed the present counsel to examine into these papers for you?

(Objected to because it appears on said record itself that the witness was a party to the suit, and in legal contemplation knew of — was bound by all the proceedings in the cause, and it is therefore immaterial.)

Ans. I did not.

(It is here agreed between counsel for the plaintiffs and defend-

ants, in order to save time, that the counsel for plaintiffs or counsel for the defendants may at the hearing raise any and all objections to questions hereafter asked the witness and her answers as fully as if the objections were taken at the time of such questions and answers and noted in the deposition.)

Question 15. The same decree, May 4, 1872, recites that *J.* M. Peek was allowed to draw upon the fund for $200.00, being the amount allowed by the heirs of Parker West, as appears by written consent of counsel, for extra services rendered, &c. Is it true that any attorney was authorized to make any such agreement or sign any such paper for you?

Ans. No, sir.

Question 16. Have you ever seen the paper referred to?

Ans. I have not.

Question 17. Have you, through your counsel and the clerk, made diligent search for said paper?

Ans. I have not. This is the first that I heard of it.

Question 18. The answer of defendants alleges that C. K. Mallory represented you and your sisters at the time of the rendition of the decree of May 4, 1872; that he appeared for you and then continued thereafter to represent you till his death occurred, in 1875. Is this true or false?

Ans. If he acted that way it was without any authority. I did not so authorize him.

Question 19. He never told you or pretended to you that he ever did so, did he?

Ans. No, sir.

Question 20. Have you ever received any money from these suits?

Ans. I have not.

Question 21. The report of Special Commissioner Peek (of April 23, 1880) states that he drew upon the fund for the credit of the consolidated causes of the Marine Bank of Norfolk, Va., for $294 in favor of Elizabeth R. West, $294 in favor of Mary E. Marrow, and $294 in favor of Missouri Smith. Is it not true that the parties refused to receive these checks?

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Ans. Yes, sir; it is true.

Question 22. I understand you, then, to say that you have refused to accept any of the money proceeds of the sale of land referred to. Am I right?

Ans. Yes; I have refused — receive them.

Question 23. Why have you refused to receive them?

Ans. Because I found out from the decree of the circuit court that my rights had been taken from me.

Question 24. When did you first learn of the decree of the Supreme Court of the United States in the case of Wallach *vs.* Van Riswick?

Ans. In 1876.

Question 25. Did you after that always claim title to the land, and was not that claim generally known in this community?

Ans. I have always claimed the title to this land, and I think it was. I know it was, because I made no secret of it.

Question 26. Did you not in fact afterwards with the other heirs make sale to Mr. Huntington of your interest in a part of this confiscated property?

Ans. I did.

Question 27. Was your claim and right to this property frequently discussed and generally known in this community?

Ans. It was.

Question 28. Are you now willing and ready to surrender and yield all of your interests in the proceeds of the sale of this land if the purchasers or those in possession will give you up the land?

Ans. Yes; so far as they are out. I do not want them to lose anything.

Counsel for the defendants, not waiving any of their objections heretofore taken or the right to any other objections, proceed to cross-examine the witness as follows:

Question 1. You have said that in 1872 you resided in the city of Richmond. Where did your brother, Mr. Geo. B. West, reside at that time and since?

Ans. Newport News, Va.; the same place where he now resides.

Question 2. How often was it your custom to see him?

Ans. About once a year.

Question 3. Did he not come to Richmond more frequently than once a year?

Ans. No, sir.

186 Question 4. How often were you in the habit of visiting Newport News?

Ans. About once a year.

Question 5. At what seasons of the year, and how long did you generally remain?

Ans. I generally came down in August and remained three or four weeks.

Question 6. When you came to Newport News was it not to visit your brother, Mr. Geo. B. West?

Ans. It was.

Question 7. Who lived with him?

Ans. My two sisters, Mrs. Smith and Miss West.

Question 8. How often did your sisters visit you in Richmond?

Ans. Very seldom they visited me.

Question 9. Did you correspond with each other?

Ans. Yes, sir; we did.

Question 10. Did you correspond frequently or not?

Ans. Sometimes we did frequently, but not regularly.

Question 11. Was the sale of the Newport News lands the subject of conversation when you visited each other?

Ans. Sometimes it was.

Question 12. Did you not know that these lands had been sold to various parties?

Ans. From hearsay I did.

Question 13. From whom did you hear it?

Ans. I don't remember any particular person; I heard it in a general way.

Question 14. Did you not know that all of the West farms or Newport News lands had been sold, and when did you first hear of it?

Ans. I could not tell exactly when I first heard of its being sold.

Question 15. Did not your father in his lifetime sell a part of these lands?

Ans. He did.

Question 16. Was not the remainder sold soon after his death?

Ans. I suppose so, but I don't know how soon.

Question 17. When did you first make enquiry and of whom in regard to it—the sales of these lands?

Ans. I don't know that I ever made any enquiry.

Question 18. Were you ever informed how these lands were sold?

Ans. Never.

Question 19. Well, how is it that you permitted lands to be
187 sold that you claim to be owner in and *make* no inquiries in regard to it?

Ans. I did not know anything about it until it was all done.

Question. 20. Were you ever in possession of these lands which you are now claiming?

Ans. No, sir; my father was in possession of them. I claimed them as his heir.

Question 21. Why did you not take possession as his heir after his death?

Ans. Because they were in the hands of commissioners, and they held on to them.

Question 22. What commissioners?

Ans. Mr. Tabb, Mr. Peek, and Mr. Mallory.

Question 23. Who made them commissioners?

Ans. Made commissioners by order of court, I suppose.

Question 24. Then you knew the court was selling these lands?

Ans. I did not know it was selling them, or what it was doing with them.

Question 25.

I knew my father had given his consent to place it in the hands of commissioners before his death.

Question 26. Do you know to what commissioner your father gave his consent?

Ans. I do not.

Question 27. What lawyer or attorney did your father generally consult about his business matters?

Ans. Mr. Mallory, generally.

Question 28. Was not Mr. Mallory his counsel in all cases so far as you know, and *was* not their relations very intimate?

Ans. I think they were.

Question 29. Did you ever say anything to the commissioners in regard to these lands?

Ans. Never.

Question 30. Do you know why these lands were sold?

Ans. I suppose they were sold to pay the debts.

Question 31. Was it not your father's wish that they should be sold for this purpose?

Ans. It was.

Question 32. Do you know when the suit was instituted, how long before your father's death, in which these lands were sold?

Ans. I don't know when or how long it was.

Question 33. Was it not instituted in your father's lifetime?

Ans. I suppose so; I don't know.

Question 34. Did you not know in your father's lifetime that he was heavily involved, chiefly as security for other people, and
188 that this suit was instituted to sell these lands to pay his debts?

Ans. I did.

Question 35. Why was it that you did not raise some objection to the sale of these lands before this, knowing that other people had purchased them and were in possession of them?

Ans. We were not able to employ counsel to see into — before.

Question 36. Why did you not say something to the commissioners about it?

Ans. Well, I did not have any particular reason; I thought they would do what was right.

Question 37. What is your claim to this land based upon?

Ans. As an heir to my father I had a right to it after his death.

Question 38. Did you not know that the land which came to the child from the father was responsible for the liabilities of the father?

(This question specially objected to because, as applied to this case, it is not true as a question of law, and it is merely asking the witness' opinion as to the question of law.)

Ans. I did.

Re-examination:

Question 1. Have you any information concerning why these old suits were instituted, except from hearsay?

Ans. Yes, sir.

Question 2. What other information have you?

Ans. I heard from my father of the suits being brought.

And further this deponent sayeth not.

MARY E. MARROW.

Mrs. MISSOURI P. SMITH, one of the plaintiffs in this suit and a witness for the plaintiffs, testifies as follows:

Defendants object and except to the competancy of the witness on the following grounds:

1. Because Charles K. Mallory, who was one of the original parties to the contract or other transaction which is the subject of the investigation, is dead.

2. Because of the incompetancy of Mrs. Mary E. Marrow, — the parties to this suit.

3. Because of the death of Miss Elizabeth R. West.

4. Because Jos. B. Brinkley is dead, which fact defendants offer to prove, if necessary.

5. For other apparent reasons.

189 Plaintiffs, by counsel, replying, deny that Charles K. Mallory was one of the parties to the original contract or subject-matter of investigation.

2. That the records show that he was the attorney and counsellor who instituted and conducted the original suit of Jos. B. Brinkley, and represented the plaintiffs in that suit and a large number of other creditors against Parker West.

3. No recovery is sought against J. B. Brinkley or his estate, and his debts have been fully paid and satisfied.

Question 1. Please state your age and residence and name.

Ans. Missouri P. Smith; Newport News; 39 years old.

Question 2. Are you one of the heirs of Parker West?

Ans. Yes, sir.

Question 3. Who are the other heirs?

Ans. Mrs. M. E. Marrow and Mr. G. B. West.

Question 4. When did your father, Mr. Parker West, die?

Ans. Fourteen years ago last December.

Question 5. When did your sister, Elizabeth West, die?

Ans. Last October.

Question 6. Who are the heirs?

Ans. Mrs. M. E. Marrow, Mr. G. B. West, and myself.

Question 7. In 1870 suits were instituted by J. B. Brinkley and J. L. Peek to sell certain property of your father's which had been confiscated by the Government, and other property of his in Elizabeth City county. Were you ever made a party to said suits?

(Question objected to on the grounds that the record is the best evidence, and if it be the purpose to contradict the record the question is objected to on that ground also.)

Ans. No, sir.

Question 8. Was any process of any kind ever served on you to appear in said suits?

(Same objection, and also because immaterial.)

Ans. No, sir.

Question 9. Did you at any time employ counsel to defend or protect your interests in said suits?

(Same objection.)

Ans. No, sir.

190 Question 10. On the 4th of May, 1872, a decree was entered in said causes, which I will now read to you. (Here counsel read to witness a decree reciting that *you* and the other heirs of Parker West were made parties to said causes on their own motion.) Is it true that you appeared in person, either by yourself or with your sisters and their husbands at the same time, and made a motion to become parties to said causes?

(Question objected to on the ground that the record is the best evidence and it is immaterial how she appeared, and if the object be to vary or contradict the records, question objected to on that ground also.)

Ans. No, sir.

Question 11. Where were you residing at that time?

Ans. At Newport News, with my brother.

Question 12. Were you in the court-house of Elizabeth City on that day?

(Objected to for the reason previously given.)

Ans. No, sir; I never was in any court-house until last December, when the ejectment suit was tried.

Question 13. Did you authorize any attorney to make any such motion, or any other motion, for you on that day, or any other day, in these causes?

(Same objection.)

Ans. No, sir.

Question 14. Is the recital therein contained, in so far as it undertakes to make you a party to said causes by appearing in person or by attorney, without foundation and utterly false?

(Same objection, because it is an effort to contradict the record.)

Ans. Yes, sir.

Question 15. Was there any order, process, notice, or paper of any kind served upon you suggesting the death of your father, Parker West, and commanding you to show cause why the said suits should not be revived against you and the other heirs?

(Objected to because immaterial and the record is the best evidence.)

Ans. No, sir; there was not.

191 Question 16. The same decree recites that Mr. Peek was authorized to check for $200, being amount allowed by the heirs of Parker West, as appears by written consent of counsel, &c. Is it true that any attorney was ever authorized to sign any such paper for you or to make any such agreement?

(Objected to because it is an effort to contradict the records.)

Ans. No, sir; never authorized any one.

Question 17. Have you ever seen that paper?

Ans. No, sir.

Question 18. Did you know anything about these recitals referred to in the decree of May 4th, 1872, attempting to make you a party to said causes until your attention was called to it after you had employed your present counsel?

(Objected to for reasons previously given.)

Ans. No, sir.

Question 19. The answer of the defendants alleges that C. K. Mallory represented you and your sisters at that time; that he appeared for you and them, and continued to represent you until his death, which occurred in 1875. Did you ever employ Mr. Mallory to so represent you?

(Same objection continues to be made.)

Ans. I did not.

Question 20. You have no reason to believe that he ever intended to represent you?

Ans. No, I have not.

Question 21. Did Mr. Mallory ever at any time, by word, act, or deed, do anything that led you to infer that he represented you?

(Same objections.)

Ans. He never did.

Question 22. Have you ever received any money from the proceeds of the sales of these lands?

(Same objections.)

Ans. I never have.

Question 23. What about a check of $294, which Commissioner Peek states in his report was drawn in your favor?

(Same objections.)

192 Ans. We returned one check. I suppose that is the one. My brother knows better.

Question 24. Have you always refused to accept payment of anything from the sales of the lands, claiming title to lands themselves?

(Same objections.)

Ans. I have.

Question 25. When did you first learn of the decision of the Supreme Court in the case of Wallach *vs.* Van Riswick?

(Same objections.)

Ans. When it was decided, in 1876.

Question 26. Was not the rights of heirs and others in confiscated property a subject of frequeant conversation after that decision?

(Same objections.)

Ans. Yes, sir.

Question 27. Did you not always after that set up your claim to this land as one of the heirs of Parker West, and was not that claim generally known in this community?

(Objected to for irrelevancy and other reasons.)

Ans. Yes, sir.

Question 28. Did not C. P. Huntington purchase from you and the other heirs your interests in a part of this confiscated property?

(Objected to as irrelevant.)

Ans. Yes, sir.

Question 29. Are you willing and do you not offer to surrender your interest in the proceeds of the sales of these lands upon the parties releasing their title to the same or all claim they may have on it?

(Objected to as irrelevant.)

Ans. Yes, sir; I do not want them to lose anything.

Cross-examination of MISSOURI SMITH:

193 Counsel for defendants, not waiving any of the exceptions heretofore taken, either as to the competency of the witness or otherwise, proceeds to cross-examine the witness:

1 Ques. How old was your father at the time of his death?

Ans. Sixty-nine years old.

2 Ques. Did you know anything in regard to certain suits instituted in your father's lifetime against him for the sale of his lands?

Ans. No, sir.

3 Ques. How long have you been living at Newport's News?

Ans. Fourteen years last March.

4 Ques. With whom?

Ans. My brother, G. B. West.

5 Ques. Where did your sister Elizabeth reside?

Ans. With my brother, G. B. West.

6 Ques. Was she younger or older than yourself?

Ans. Older.

7 Ques. Upon what is your claim to this land now in controversy based?

Ans. Confiscation.

8 Ques. Why have you not made this claim before?

Ans. Did not know I had a right until '76, when that case was decided in Washington.

9 Ques. Then you never knew that you had any claim until 1876, I understand you to say?

Ans. No, sir; I did not know I had any.

10 Question. Did you not know in 1876 and before that time that these lands had been sold and purchased by certain parties?

Ans. Yes, sir; I heard so, at least.

11 Question. Who sold these lands to their purchasers?

Ans. Commissioners.

12 Question. Who were the commissioners that sold them?

Ans. Mr. Tabb, Mr. Mallory, and Mr. Peek.

13 Question. Where did the commissioners get authority to sell the land from?

(Question objected to.)

Ans. I reckon the court appointed them.

14 Question. Did you know Mr. Mallory?

Ans. Yes, sir.

15 Question. What was his relation to your father?

Ans. His lawyer.

16 Question. Did you not know before 1876 that these lands had been purchased from the commissioner?

Ans. Yes, sir; I heard so; I did not know it.

17 Question. Did you not know that your father was heavily
194 involved, chiefly as security for others, and that it was necessary to sell certain of these lands to pay these liabilities, and were not some of them sold in his lifetime?

(Question objected to as immaterial and irrelevant.)

Ans. I know he was in debt, chiefly as security for others. I think brother bought his before his death.

18 Question. From whom did your brother buy his?

Ans. Commissioners, I think.

19 Question. Why were these lands sold?

(Question objected to as irrelevant and immaterial.)

Ans. —— pay his debts, I reckon; I do not know anything about the business.

20 Question. Did you ever make any enquiry as to the sale of these lands?

Ans. No, sir.

21 Question. Did you ever notify any of the purchasers that you claimed any interest in these lands?

Ans. I never saw any of them to notify them. I never did *not* notify them. They all knew we were going to try to get it back after '76.

22 Question. What reason have you for saying they knew you were going to try to get it back after 1876?

Ans. Whenever I heard that they had bought it I always said publicly that we were going to try to get it back.

23 Question. Did not many of the purchasers reside within six or seven miles of Newport News and nearer, and why did you not go to them and tell them of your claim?

Ans. I do not know where they all reside. I did not have an opportunity of telling them. My health would not justify my going out.

24 Question. Did you not know a number of these purchasers and where they resided?

(Question objected to as irrelevant and immaterial, and because the purchasers knew as much about the title to this property as the witness.)

Ans. I knew where some resided; I did not know where all.

25 Question. Did you ever say a word to any one of them in regard to your claim?

(Same objection as above.)

195 Ans. I don't think I ever saw any of the purchasers of the land after they bought it.

26 Question. Could you not have communicated to some of these purchasers, either by letter or otherwise?

(Same objection.)

Ans. I could have done so.

27 Question. Do not a number of these purchasers reside in Hampton?

Ans. I do not know who all the purchasers were; some of them resided in Hampton.

28 Question. Since your residence at Newport News was it not your custom to visit Hampton frequently?

Ans. No, sir; very seldom.

29 Question. How often, as a general thing?

Ans. Sometimes not once a year.

30 Question. Did not your brother, with whom you have resided during the last fourteen years, frequently visit Hampton?

Ans. Yes, sir.

31 Question. Was not the sale of these lands a matter of frequent discussion between yourself, your sister, and your brother?

Ans. No, sir.

32 Question. Can you say, of your own knowledge, that any one of these purchasers ever heard of these claims you said you publicly made?

Ans. I thing they have; Mr. Groome has, I am almost sure.

34 Question. Same question is again repeated.

Ans. I cannot.

35 Question. Did you not know it was your father's wish that the Newport's News land should be sold to pay the liabilities for which he was responsible?

(Objected to as immaterial and irrelavent.)

Ans. I never heard him say so.

36 Question. When was it that you first knew that any of these lands were sold?

Ans. I think brother's was the first; I knew when he bought it; I heard before he came back to the county, in March, 1872, that he purchased it.

37 Question. Were you not acquainted with all the commissioners of sale—Peek, Mallory, and Tabb? Did you ever say anything to *either* of them — regard to your claim to these lands?

Ans. I was acquainted with all three, but I never said anything to them about it.

196 Redirect examination by counsel for plaintiffs:

1 Ques. Where did you reside in 1870 and 1871?

Ans. King and Queen county, Va.

2 Ques. Do you know whether the lands in controversy were sold at public auction or private sale?

Ans. I do not.

3 Ques. Do you know anything at all about the sale of these lands except what you have heard from others?

Ans. No, sir.

4 Question. Do you even know who were the purchasers of this property except from hearsay?

Ans. No, sir.

And further this deponent saith not.

M. P. SMITH.

GEORGE B. WEST, one of the plaintiffs in this case, being duly sworn, deposeth and saith as follows:

The defendants object and except to the competency of the witness on the following grounds:

1st. Because Charles K. Mallory, who was one of the original parties to the contract or other transaction which is the subject of investigation, is dead.

2d. Because of the incompetency of Mrs. Mary E. Marrow, one of the parties to this suit.

3d. Because of the death of Miss Elizabeth R. West.

4th. Because Joseph B. Brinkley is dead, which fact defendants offer to prove, if necessary.

5th. For other apparent reasons.

Counsel for plaintiffs makes the same reply to these objections as *are* heretofore made when Mrs. Missouri P. Smith was examined.

1 Ques. Please state your age, residence, and occupation.

Ans. Forty-seven; Newport News; merchant.

2 Ques. In 1870 to August rules a chancery suit was instituted by Joseph B. Brinkley against Parker West and others, and another suit by Jno. L. Peek against West and others, the object of which was to sell certain real estate of your father's and certain interest of his in confiscated property in Elizabeth City county. Were you ever served with any summons in the said suits to appear and defend your interest as one of the heirs of Parker West?

(Question objected to on the grounds that the record is the
197 best evidence; that the evidence sought to be elicited is immaterial, and if it be the purpose of the question to contradict the record it is objected to on that ground also.)

(Plaintiffs' counsel states that the record was not disclosed in the service of the summons.)

Ans. I was not.

3 Ques. On the 4th day of May, 1872, a decree was entered in the said causes reciting that you and others, the heirs of Parker West, on their motion, were made parties to the said suits and asked leave to file your answer. Is it true that you appeared in person, either by yourself or with your sisters and their husbands, at that time, and made a motion to become parties defendant to said causes and to file your answer?

(Question objected to on the ground that the record is the best evidence, and it is immaterial how he appeared, and if the object be to vary or contradict the records objected to on that ground also.)

Ans. It is not true.

4 Ques. Did you authorize any attorney to make any such motion or any other motion for you on that day or any other day in these causes?

(Question objected to on the ground that the record is the best evidence, and if the object be to vary or contradict the record objected to on that ground also.)

Ans. I did not.

5 Ques. Is the recital therein contained, in so far as it undertakes to make you a party to said causes by appearing in person or by attorney, without foundation and utterly false?

(Objected to because it is an effort to contradict the record.)

Ans. It is.

6 Ques. Was any order, notice, writ, process, or paper of any kind or description served upon you suggesting the death of your father and commanding you to show cause why the said suits should not be revived and proceeded in against you and his other heirs?

(Objected to as immaterial and because the record is the best evidence.)

Ans. I think not; I have no recollection that there was.

198 7 Ques. When did you first learn that such an order as that of May 4th, 1872, had been entered?

(Objected to for reasons previously given.)

Ans. Last year—1885.

8 Ques. Did you authorize any attorney to sign any paper or make any agreement for you allowing Geo. M. Peek, Esq., $200 for extra services in said causes?

(Objected to because it is an effort to contradict the record.)

Ans. I did not.

9 Ques. Did you have any knowledge of any such paper until your attention was called to it by your present counsel in 1885?

(Objected to because immaterial and for other reasons previously given.)

Ans. I did not.

10 Ques. The answer of the defendants alleges that C. K. Mallory represented you and your sister at the time of the rendition of the decree, May 4, 1872, and that he appeared for you and them and continued thereafter to represent you till his death, in 1875. Did you employ Mr. Mallory to represent you?

(Objected to for reasons previously given.)

Ans. I did not. I saw Mr. Mallory quite often between '72 and his death, and he never told me he so represented us.

11 Ques. Did you ever pay him any fee, or did he ever make demand on you for such services?

(Objected to as immaterial and for other reasons previously given.)

Ans. I never paid him, nor did he ever make such demands.

12 Ques. When did you employ counsel to look into the interest of yourself and sister in this confiscated property?

Ans. In 1881. On account of their representing some other party we dropped the suit. I employed the present counsel last year.

13 Ques. The report of Mr. Peek, one of the commissioners (*repot* 23d, 1880), stated that he drew upon the fund to the credit of consolidated causes in the Marine Bank of Norfolk, Va., for $294 in favor of each of your sisters. Is it true that the parties refused to receive their checks?

(Objected to because immaterial and for other reasons.)

199 Ans. It is true.

14 Ques. Explain what became of the checks.

Ans. I dropped them on the road whilst bringing them to return them to Mr. Peek.

15 Ques. Did you notify Mr. Peek to stop payment at bank of those checks?

(Objected to because immaterial and for other reasons.)

Ans. Yes, as soon as I got to Hampton.

16 Ques. Have the heirs ever received any money from the special commissioners from the proceeds of the sale of these lands?

Ans. Not to my knowledge.

17 Ques. Have they not always refused to receive payment, claiming title to the land itself?

Ans. All except myself. I purchased from the commissioners, and in that way I have received what was due me from the estate.

18 Ques. When did you first learn of the decision of the case of Wallach *vs.* Van Riswick?

Ans. I think it was in 1876.

19 Ques. Is there money enough on deposit to pay back the purchasers of this real estate their purchase-money, with interest?

(Objected to because immaterial.)

Ans. There is.

20 Ques. Have you offered to pay them back their purchase-money, with interest, if they would surrender the land?

(Objected to because immaterial.)

Ans. I have.

21 Ques. Are you still willing to do this, and do you now make the same offer?

(Objected to because immaterial.)

Ans. I am willing and do make the same offer.

22 Ques. Was there a great deal of property confiscated in Elizabeth City county?

(Objected to because immaterial.)

Ans. Right much.

200 23 Ques. After the decision, in '76, of the Supreme Court in *Wolloch vs.* Van Riswick was the question of rights of parties in confiscated property, heirs and others, *is* subject of frequent conversation in this county?

(Objected to as irrelevant and immaterial.)

Ans. It was.

24 Ques. After that decision was not the right and claim of the West heirs to this property frequently discussed and generally known in this section?

(Objected to — immaterial and irrelevant.)

Ans. Yes; it was so much so that in 1880, when Mr. Huntington was talking of locating the terminus of the C. and O. railroad, his lawyers approached us to purchase our right.

25 Ques. Did the heirs of Parker West make any sale of their right in this confiscated property to C. P. Huntington?

(Objected to as immaterial and irrelevant.)

Ans. In part of it.

(The deed for this purchase will be filed, if not already filed with the bill, with these depositions.)

(Introduction of this paper objected — as immaterial and irrelevant.)

26 Ques. Was this purchase generally known to almost everybody in this community and vicinity of Newport's News?

(Same objection.)

Ans. I suppose it was; there was a good deal of talk about it.

27 Ques. Did not C. P. Huntington, when he purchased from those who held title through special commissioners, keep back a part of the purchase-money to await the decision of the court or the rights of the West heirs to this property?

(Same objection.)

Ans. I have heard so; I do not know.

28 Ques. Did you have an agreement with Mr. Huntington that he should protect these purchasers?

(Same objection.)

201 Ans. I did. He was to pay them $150 per acre, which was sufficient to pay the purchase-money and interest. When we sold — Mr. Huntington we were afraid that, having our right, he would not pay the purchasers anything, and this was to protect them.

28 Ques. Did you have the agreement reduced to writing?

(Same objection.)

Ans. We did.

29 Ques. Will you please produce it?

(Same objection.)

Ans. Witness here produces original agreement. By consent of counsel and at request of plaintiffs' counsel a copy is filed in place of original, Ex. "A," the defendants, however, not waiving their objection to the admissibility of this evidence on the grounds stated, that it is immaterial and irrelevant.

30 Ques. Did you give to C. P. Huntington ten acres of land to induce him to bring the railroad to this point?

(Same objection.)

Ans. I gave him ten acres of land; I thought it might be some inducement.

31 Ques. Have the *tother* heirs of Parker West released to you any claim that they may have upon the property you purchased from the special commissioners?

(Same objection.)

Ans. They have.

32 Ques. Have you not, since you became aware of your rights in the property, in 1876, claimed title to the land itself, and have you since that time done any act, to your knowledge, to waive such right?

(Objected to.)

Ans. I really did not know I had any right. I thought that by my action in purchasing from the commissioners that I had lost my right. I purchased in '76, I think. I purchased from Dr. Hope 5 acres of land, and I thought that this purchase and the purchase from the commissioners would invalidate my rights.

33 Ques. If the views now entertained be correct, that the real estate of your father which was confiscated descended to his
202 heirs, were you not as a purchaser from the commissioners buying your own property or that in which you had a large interest?

(Objected to as irrelevant and immaterial and calling for an opinion from the witness.)

Ans. Yes, sir.

34 Ques. Have you done any act of any kind to waive your right to claim the land itself, except being a purchaser of some of it?

(Same objection.)

Ans. I think not.

35 Ques. Were you not ignorant of your rights in this property at the time of purchasing it from the commissioners?

(Same objection.)

Ans. Yes, sir; I purchased twelve acres from father in '71. Be-

fore that was satisfied, the commissioners allowed me to purchase three more acres along said land that I had purchased. I am in possession of 15 acres, but cannot say that I ever received a deed from the commissioners, but I suppose it was ratified by the court. I do not know of my own knowledge, however. Had the decision of Wallach *vs.* Van Riswick been prior to 1871 I never should have purchased from the commissioners.

36 Ques. When did you take possession of the 12 acres of land that you purchased from your father?

Ans. Jan'y, 1872.

37 Ques. Were you at that time negotiating to purchase the interest of Bowen and Alexander?

(Question objected to as immaterial.)

Ans. I was, prior to my father's death, in Dec'r, 1871. I suppose that in Jan'y, 1872, after the death of my father, Bowen and Alexander had no right in this property.

38 Ques. Have the commissioners ever rendered you any statement showing what amount was due to you or by you in the lands which you purchased?

(Objected to as immaterial.)

Ans. They have not.

39 Ques. Have you ever had any final settlement with them?

(Objected to as immaterial.)

203 Ans. I have not.

40 Ques. In the answer to the 12th question you state you first employed counsel in 1881 to look into the interest of yourself and sisters in these suits, and that a suit was commenced and afterwards dismissed. Look at the paper now shown you and state if this is the suit to which you refer.

(Objected to as immaterial.)

Ans. It is Exhibit "B" (subppœna in chancery herewith filed).

41 Ques. In the answer to the same question you state you employed your present counsel last year. Please refresh your memory as to that particular matter and state if Miss Lizzie West, your sister, was not in consultation with present counsel several years ago.

(Objected to as immaterial.)

Ans. She was, I think, in 1882 or '3; I am not sure which, however.

42 Ques. After the decision of Wallach *vs.* Van Riswick were you present on any occasion with your sister, Miss Lizzie West, and Mr. Peek when the claim of the West heirs was discussed? And, if yea, state what was said.

(Objected to as immaterial.)

Ans. I was present at the house of Mrs. Stores, in Hampton, when

the matter was talked about, and we said that under the decision that the confiscated property would revert to us; that the creditors would have no claim upon that property, when Mr. Peek stated that we had lost our right by having been made parties to a suit. We there denied the fact that we had ever been made parties to any suit to invalidate our claim.

43 Ques. Your sister Lizzie lived with you?

Ans. Yes.

44 Ques. Did she always deny having been made party to these suits under which this land was claimed to have been sold?

(Objected to because immaterial.)

Ans. She did.

45 Ques. Did she always repudiate having employed any attorney to represent her in said suits?

(Objected to because immaterial.)

204 Ans. She did.

46 Q. Do you know the fact that she was not in the C. H. of Elizabeth City county in person on May 4th, 1872?

(Objected to as immaterial.)

Ans. I am sure she was not there in person.

47 Ques. You spoke of giving 10 acres of land to C. P. Huntington; was that conveyed to him in the deed of 1880?

(Objected to as immaterial.)

Ans. It was. It was in the deed conveying our interest in the confiscated property. Ten acres of the twenty I own was excepted. Under our original agreement Mr. Huntington was not to condemn any of my land, and having tried to condemn them, I would not have given him a deed for the ten acres, believing that he had forfeited his contract, had not the 10 acres been incorporated in the other deed.

48 Ques. Have there been any improvements *been* made in the property in controversy?

(Objected to as immaterial.)

Ans. None.

Counsel for defendants, not waiving their exceptions either as to the competency of the witness or *or* to any question or answer heretofore taken, proceeds to cross-examine the witness:

1 Ques. You have stated that you purchased 12 acres of Newport News land. State all the facts and circumstances — regard to your said purchase.

Ans. In 1871 I was living in Richmond and my father with me, and, finding him dissatisfied up there, I concluded to return to Elizabeth City county, if I could purchase *of* the Newport News land, my father owing me a bond of $1,000, bequeathed by Mrs. Watson. I purchased from him 12 acres of land for $100 per acre, thinking

that I could purchase the confiscated right from Alexander and Bowen in this 12 acres, and thereby have a home at Newport News for himself and me.

2 Ques. How was the settlement of this bond you speak of to be made?

Ans. By the purchase of this land.

3 Ques. Did not the contract for the purchase of this land require that the payment for it should be made through the court?

Ans. I don't remember.

4 Ques. Did not the contract require that the sale of these
205 12 acres to you be ratified by the court in these consolidated causes and the proceeds of sale distributed by the order of the court in said causes?

Ans. It may have, but I don't remember.

5 Ques. Have you a copy of that contract?

Ans. I have not; I don't think I have.

6 Ques. If you can find the original contract, or an authenticated copy from the records of Elizabeth City county, you will file the same herewith as a part of your deposition; otherwise the defendants reserve the right to do so.

Ans. I will.

7 Ques. Had not your father resided at or near Newport News since the war?

Ans. Yes, at N. News.

8 Ques. What was the condition of his health a year or two before his death?

Ans. Fair health for an old man.

9 Ques. Were you personally acquainted with the late Chas. K. Mallory, and what were the relations between him and your father?

Ans. I was acquainted with him; he was a friend and usually his lawyer.

10 Ques. Did your father not always consult him in regard to his legal matters, holding him in high esteem as to his judgment, capacity, and fidelity?

(Objected to as irrelevant and immaterial; 2d, because in these cases it appears by record that C. K. Mallory instituted and prosecuted the original suit for the sale of the lands in question, representing a large number of creditors of Parker West.)

Ans. He held him in high esteem. I do not know that he always consulted him; I know he did quite often.

11 Ques. Did he not consult him in regard to the sale of Newport News land?

(Objected to for reasons assigned to the former question.)

Ans. I think not.

12 Ques. Was it not your father's wish that the Newport News land should be sold to meet his liabilities in preference to his other lands, there being considerable demand for them?

(Objected to as irrelevant and immaterial and in no way affecting the interest of the plaintiffs.)

Ans. I think he would have preferred any other of his
206 lands to have been sold, because he always believed it would be a terminus of a railroad, and, if we should receive any property from him, he preferred leaving us Newport News property.

13 Ques. Did he not sell 50 acres of this land to Mr. A. J. Ford, of Richmond?

(Objected to as irrelevant and immaterial.)

Ans. He did.

14 Ques. Did he receive the money for it?

(Objected to as irrelevant and immaterial.)

Ans. He did not.

15 Ques. How was the money paid?

(Objected to as irrelevant and immaterial.)

Ans. I do not know.

16 Ques. Did you ever see the contract between your father and Mr. Ford in regard to the purchase of this land?

(Objected to.)

Ans. I did.

17 Ques. Can you state any of its particulars?

(Question objected to because the contract must speak for itself, and because irrelevant and immaterial.)

Ans. Only so far as the boundary and price.

18 Ques. To whom was the money paid?

(Objected to as being irrelevant and immaterial.)

Ans. I don't know; I suppose to the commissioners.

19 Ques. Were not these suits for the sale of these lands pending at the time you and Mr. Ford made your purchases?

(Objected to as being immaterial and irrelevant.)

Ans. I think they were pending.

20 Ques. What makes you think so?

(Objected to as immaterial and irrelevant.)

Ans. I think father had notice of it.

207 21 Ques. Did you not discuss with your father the matter of the sale of these lands by the court?

(Objected to as irrelevant and immaterial.)

Ans. I do not know that I ever did, except the two lots that he sold himself.

— Ques. Would his other lands at that time have sold for sufficient to meet his liabilities?

(Objected to as irrelevant and immaterial.)

Ans. They would not.

22 Ques. Do you know what the Newport News land was assessed at at the time of these sales?

(Objected to as being irrelevant and immaterial.)

Ans. I do not. I think it was $50 per acre.

23 Ques. What was the value of these lands for agricultural purposes?

(Objected to as being immaterial and irrelevant.)

Ans. I am not sufficient farmer to know.

24 Ques. Was not $100 per acre purely a speculative price?

Ans. I think it was, though in my purchase I did not think it a speculation.

25 Ques. Was not the purchase of the 20 acres which you purchased the most desirable of the whole Newport News tract?

Ans. I do not know that it was at that time.

26 Ques. Is it not now?

Ans. I think it is.

27 Ques. Why did you purchase that 20 acres in preference to any other?

Ans. I purchased the first 12 acres because it had a house on it, and I wanted it for a home. I purchased the remainder because it lay alongside of my other land.

28 Ques. You say your father owed you $1,000 which had been left to you by somebody. How came he to owe it to you?

Ans. He owed it to Mrs. Watson; she held his bond for $1,000; she bequeathed it to me.

29 Ques. Your father was largely indebted as principal and security, was he not?

Ans. He was.

30 Ques. You knew of this fact before his death, did you not?

(Objected to because irrelevant and immaterial.)

208 Ans. I did.

31 Ques. You also knew, did you not, before his death that his creditors had instituted these suits to subject these lands to the payment of these debts?

(Question objected to, 1st, because the witness had already testified that no process was ever served upon him as one of the heirs of Parker West, and that he never appeared, either in person or by counsel, in said suits, and because 'tis irrelevant and immaterial.)

Ans. I knew there were suits instituted for that purpose. I did not know that they were these particular suits.

32 Ques. You knew also at the time, did you not, that various portions of these lands were being sold in these suits?

Ans. I did not before his death. I did not know it before I got back in Elizabeth City county, Jan'y, 1872.

34 Ques. You learned it, then, as I understand you, about the time of your return to the county, in Jan'y, 1872?

(Question objected to as irrelevant and immaterial and for reasons heretofore assigned.)

Ans. I learnt about that time that part of it was sold.

35 Ques. And then you were pretty well informed, were you not, of the sales and the names of the purchasers as they occurred?

(Question objected to for reasons heretofore assigned and because irrelevant and immaterial.)

Ans. I think it was in the summer or fall, when the survey was made, before I knew the names of the purchasers. I knew before that some sales had been made.

36 Ques. Did you enquire who the purchasers were when you heard the sales had been made?

(Objected to as irrelevant and immaterial.)

Ans. I made no special enquiry. I may have heard the names of the purchasers when I heard of the sales.

37 Ques. Why did you make no special enquiry?

(Objected to as irrelevant and immaterial.)

Ans. I did not think that I had any particular interest in
209 it. I thought that it would take all the land to satisfy the debts, and — made no difference to me who were the purchasers.

38 Ques. Then at that time you made no claim to an interest in these lands?

(Objected to, 1st, because the witness has testified heretofore that he and his sisters were ignorant of any rights in the confiscation until 1876, after the case of *Wolloch vs.* Van Riswick was decided, and because it it immaterial and irrelevant.)

Ans. I did not.

39 Ques. Were you not personally acquainted with all the commissioners of sale in said suits?

(Objected to as irrelevant and immaterial.)

Ans. I was.

40 Ques. Did you not see them frequently?

(Objected to as irrelevant and immaterial.)

Ans. Yes; quite often.

41 Ques. Did you make known to them or any of them any objection on your part to the sale of these lands by them in these suits?

(Objected to as irrelevant and immaterial.)

Ans. I did not; till after the lands were sold I did not know that we had any interest in them.

42 Ques. Then you did not make known to any of the purchasers of said land any such objection?

(Objected to as irrelevant and immaterial.)

Ans. I did not.

43 Ques. You have said that you considered $100 per acre a speculative price for these lands. On what was the speculation based? Was it not on the expectation that the Chesapeake and Ohio railroad would make its terminus there?

Ans. It was.

44 Ques. And if the road had made its terminus elsewhere the lands would not have been worth as much as the price named, would they?

Ans. They would not unless there had been an expectation of another road terminating there.

45 Ques. And was there any such expectation?

210 Ans. There was not at that time.

46 Ques. Then at that time, if this road had gone elsewhere, you would have preferred the money the lands brought to the lands themselves, would you not?

(Objected to as immaterial and irrelevant.)

Ans. I would not.

47 Ques. Then how do you account for your previous answers when you say that $100 per acre was a speculative price; that the lands would not have brought as much if the road had gone elsewhere, unless there was an expectation of another road making its termination there, and there was no such expectation?

(Objected to as irrelevant and immaterial.)

Ans. Because I had and have expectations that other roads will terminate there.

48 Ques. You say you offered to refund the money to the purchasers. When did you first make this offer?

Ans. I am not sure whether it was made in 1881, when the other suit was instituted, but we intended to make this offer. I made it in 1885.

49 Ques. Was it not an assured fact at the time you first intended to make the offer, in 1881, as you have stated, that Newport News was or was to be the terminus of the road?

Ans. It was.

50 Ques. Why did you not make this offer before it was settled that the road would come to Newport News?

(Objected to as being immaterial.)

Ans. Because we did not have enough money to buy out all of the purchasers, and we did not want any of them to *loose* anything by us.

51 Ques. But at the time referred to these lands were worth a great deal more than the purchasers gave for them, were they not?

(Objected to for irrelevancy.)

Ans. I think they were.

52 Ques. And if it had not been for the rise in value you would not have offered to restore the money and take the land, would you?

Ans. I would if I had have had the means. We did so as soon as we had the means to do so.

53 Ques. You say you learned of your interest in these
211 lands in 1876; why did you not proceed to recover them then at once?

Ans. Had we done so the purchasers would have probably lost part of their purchase-money.

54 Ques. It was, then, only out of consideration for the purchasers that you did not proceed?

Ans. That is the reason.

55 Ques. Did you not, some time in the summer of 1880, attend a meeting of the owners of Newport's News land, in which a large number, if not the whole number, of them were represented in person, when it was proposed to sell the lands to Mr. A. B. Green, the agent of Mr. Huntington? Did you intimate to any one of these parties present that you and your sisters proposed to make claim to this land?

Ans. I attended a meeting of the owners of the land. I don't remember that it was in '80; think in '79 or '80, however. I withdrew from the meeting because I did not propose to sell my land. I don't know that I stated to any of them that we proposed to make claim to this land, but it was generally known, I think, that we did propose to make such a claim.

56 Ques. Was any allusion made that day to any such claim?

Ans. Not that I know of.

57 Ques. Why did you not say something to Mr. Green or those gentlemen in regard to this claim?

Ans. The meeting was for another purpose. I staid in there a very short while.

58 Ques. What was its purpose?

Ans. I think it was to sell the land to Mr. Green or some agent for the railroad company.

59 Ques. Did you not hear Mr. Green then and there say that if the railroad company or Mr. Huntington could not get all of these parcels they did not want any?

Ans. I don't remember. I think Mr. Green did not admit that he had anything to do with Mr. Huntington. He may have stated that he thought Mr. Huntington would not come unless he got these lands.

60 Ques. Do you know what price Mr. Green offered these parties for these lands that day?

Ans. I did not know that he made any offer.

61 Ques. Was not the object of that meeting to get concerted action on the part of the purchasers of these lands as a body and to sell to the railroad or to Mr. Huntington?

Ans. The meeting I attended—I think that was the object.

62 Ques. Do you not know there were several efforts made to get the purchasers of these lands together in conference and agree upon some united ac- as to the sale of these lands to the railroad?

212 Ans. I only know of one effort, and that, I think, was in 1879, at Barnes' Hotel, in Hampton.

63 Ques. Did you not know Mr. Green was making every effort to buy these lands for 8 or 10 years before they were finally purchased?

Ans. I did not. I knew he was buying around Newport News, but did not know he was making an effort to buy these lands.

64 Ques. Mr. Green commenced purchasing lands around N. News in 1873. Did he not, soon after his arrival there in 1873, endeavor to purchase your land?

Ans. Not where I live. He tried to buy the Pumpkin Hall tract. I do not remember the year.

65 Ques. Did he never attempt to buy your lands; if so, when did he open negotiations with you? I mean your 20 acres of Newport News land.

Ans. He never attempted until after I had given him an option for one half.

66 Ques. When was that?

Ans. In summer of 1880, I think.

67 Ques. Did you not know Mr. Green purchased some of Newport News land as far back as 1873 or 1874?

Ans. I have an indistinct recollection of his purchasing from Mr. Elliott.

68 Ques. Did you not know Mr. Green was purchasing all the land in that neighborhood that he possibly could?

Ans. All except this Newport News tract; and, by his not purchasing this tract, he tried to lead us to believe he was not buying for railroad purposes.

69 Ques. Did you not always believe he was buying for railroad purposes?

Ans. Yes; I so believed.

70 Ques. I understand you to have said that you never intimated to any of the commissioners of sale, all of whom you personally knew, nor did you suggest to any of the purchasers the claim of yourself and your sisters to these lands until 1885. Am I correct?

Ans. To Mr. Peek we did on one occasion. No legal notice was given, but it was talked of. We gave it to Mr. Peek in this conversation at Mr. Storer's in 1876.

76 Ques. Had not these lands been all purchased in 1876?

Ans. Most of them had. I do not know that all of them had. If Mr. Whitehead's had been purchased I am pretty sure all of them had.

77 Ques. Now, why was it you did not go to some one of these purchasers and tell them of the claim of yourself and sisters?

Ans. We thought the law gave us a certain number of
213 years to make the claim, and we kept it no secret that we would make such a claim.

78 Ques. Can you say of your own personal knowledge these purchasers ever knew of this comtemplated claim of yourself and sisters?

(Question objected to as irrelevant and immaterial.)

Ans. I know that Mrs. Groome knew of it; I don't know of any other.

79 Ques. How do you know she knew of it?

Ans. Because it had been mentioned, so she could get hold of it.

80 Ques. How do you know that?

Ans. I have heard her father speak of it.

81 Ques. Then you do not know of your own personal knowledge, except as you have stated above?

Ans. I do not.

82. Ques. Do you know from whom these other parties purchased their lands beside yourself and Mr. Ford?

Ans. I do not. I suppose from commissioners.

83 Ques. When the commissioners gave you checks for your sisters, which you lost, and credited you on your bond which you had given them for the purchase of land from them—credited you, I mean, with your dividend—did you make any objection to taking the checks to your sisters or to the said credit?

Ans. I did not. I think I stated I did not think they would receive the checks.

84 Ques. How do you account for the fact that Mr. Huntington gave the purchasers from the commissioners about $300 an acre and only gave you and your sisters about $40 for the same land?

Ans. I think he intended, after buying our right, to refuse to pay them any more than he had agreed to pay them in our agreement with him.

85 Ques. But he did not do so, did he?

Ans. I don't know. I suppose his contract with them forced him to pay before this matter was settled.

86 Ques. Then when he entered into his contract with them he must have done so supposing they had title to the property and in ignorance of your claim, must he not?

(Question objected to as being an opinion from the witness and not as eliciting any fact.)

Ans. I don't see wherein he was ignorant of our claim when
214 his lawyers approached us, I think, before the contract was made.

87 Ques. Do you believe that Col. Chas. K. Mallory would have practiced a fraud upon you and your sisters?

(Question objected to because no such charge has been made against Chas. K. Mallory.)

Ans. I do not, if he was in his right mind.

88 Ques. Upon what is your claim to these lands based?

Ans. Upon the decision of the Supreme Court (Wallach *vs.* Van Riswick), believing that father's creditors could not take the land that had been confiscated after the U. S. Government had taken away all his right and title.

Re-examined in chief:

1 Ques. Am I right in supposing yourself, your father, and all your sisters, except Mrs. Smith, lived in Richmond in 1870 and 1871?

Ans. Mrs. Marrow — lived in Richmond since 1861. Myself, Sister Lizzy, and father moved to Richmond from Newport News first of 1871, and moved back to N. News — 1872, except my father, who died in Richmond in Dec'r, 1871. Mr. Smith, in years 1870 and 1871, was living in King and Queen county.

2 Ques. How many persons were present in the meeting you referred to in 55 cross-question?

Ans. About eight or ten. Not all of these gentlemen were purchasers of the Newport News land, though I think they all had an interest in bringing the road to N. News.

And further this deponent saith not.

GEO. B. WEST.

EXHIBIT "A." Filed with the Deposition of Geo. B. West.

This agreement, made this the sixth day of December, A. D. 1880, between Collis P. Huntington, of the city, county, and State of New York, of the first part, and William P. Marrow and Mary E., his wife; Elizabeth R. West, George B. West, and Missouri P. Smith, of the second part, witnesseth: That the said Collis P. Huntington, in consideration of the conveyance to him by the said parties of the second part, by their deed bearing even date herewith, for the sum of $8,000, of all their right, title, interest, and estate in and to that certain piece, parcel, or tract of land located in Southfield
215 magisterial district, in the county of Elizabeth City and State of Virginia, known as the "Newport News farm," on James river, and bounded by Newport News creek and the lands formerly owned by Burke and the lands of West's heirs and by the lands formerly owned by Bowman (with the exceptions of certain parcels of said land specifically excluded in said deed), doth promise, covenant, and agree to and with said parties of the second part that he (the said Huntington) will not condemn or cause to be condemned any land or lands at or near Newport News, in said county and State, in and to which the said parties of the second part have any right, title, interest, or estate, except for a right of way in crossing or passing through said lands; and the said Collis P. Huntington, for the consideration aforesaid, doth further promise, covenant, and agree to pay to the purchasers of said lands under a decree of the circuit court entered in the chancery causes of Peek, for, &c., *vs.* West, &c.; Brinkley, &c., *vs.* Latimer, West, &c., and Willis *et ux. vs.* Latimer—that is, to said purchasers of the lands granted and conveyed to the said Huntington by the aforesaid deed to him from the *second* parties of the second part—the sum of $150 per acre, or in that ratio, as an indemnity to said purchasers for what they paid for said lands purchased by them as aforesaid under said decree, the

said sum of $150 per acre being one-half of the amount or the said cash instalment stipulated by the said Collis P. Huntington in his various contracts with said purchasers to be paid to them, unless the said sum of $150 per acre shall exceed the consideration per acre named in said contract, in which cases the said Collis P. Huntington is to pay only the consideration of his said contracts with them.

This agreement is made with the express understanding that should the said Wm. P. Marrow and Mary E., his wife, fail or refuse to execute and acknowledge the aforesaid deed then this agreement is to be void and of no effect.

Witness the following signature and seal.

COLLIS P. HUNTINGTON, [SEAL.]
By FRANK STORRS, *Attorney-in-Fact.*

(Copy.)

EXHIBIT "B." Filed with Deposition of Geo. B. West, Ans. 40.

The Commonwealth of Virginia to the sheriff of Elizabeth City county, Greeting:

We command you that you summon Joseph B. Brinkley,
216 John L. Peek, surviving partner of himself and Thomas Peek, deceased; L. H. Sclater, J. P. Hope, H. C. Whiting, M. H. Haas, per. rep. of M. A. Shield, deceased; M. H. Haas, per rep. of Maria E. Marrow, dec'd; Wm. K. Tabb, Malvina Elliott, H. Phoebus, Joseph G. Fulton, Wm. H. Kimberly, James A. Watkins. B. F. Tennis, per. rep. of T. S. Tennis, deceased; N. Gammel, surviving partner of himself and T. S. Tennis, dec'd; George Schermerhorn, John Saunders, Jerome Titlow, Sam'l J. White, Wm. S. Howard, A. J. Ford, John S. Tucker, John B. Whitehead, Mary Shield and Mallory Shield, the last two infant children of Mallory A. Shield, dec'd; Charles Marrow, Mary Marrow, and G. M. Marrow, the last three infant children of Maria E. Marrow, dec'd; D. G. Marrow, Gilbert Mears and Rebecca, his wife, and said B. F. Tennis—the said Rebecca and B. F. being devisees of T. S. Tennis, dec'd—to appear at our clerk's office of our circuit court of Elizabeth City county, at rules to be holden for the said court on the first Monday in August next, to answer George B. West, Elizabeth R. West, Missouri P. Smith, and William P. Marrow and Mary E., his wife, of a bill in chancery exhibited by them.

And have then there this writ.

Witness S. E. Bickford, clerk of our said court, at his office, this July 12th, A. D. 1881, and in the 106th year of the Commonwealth.

S. E. BICKFORD, *Clerk.*

A copy.
Teste: S. E. BICKFORD, *Clerk.*

Endorsements: West and West, &c., *vs.* Jos. B. Brinkley and *als.* In chancery. 1881. Returnable to August rules, circuit court.

Executed this 18th day of July by serving copies of the within on the following-named persons: 1, John L. Peek; 2, L. H. Sclater; 3, J. P. Hope; 4, H. C. Whiting; 5, H. Phoebus; 6, Jos. G. Fulton; 7, Wm. H. Kimberly; 8, Jas. A. Watkins; 9, B. F. Tennis; 10, N. Gammel; 11, Wm. Gatewood; 12, George Schermerhorn; 13, Jno. Sanders; 14, J. Titlow; 15, S. J. White; 16, Wm. S. Howard; 17, D. G. Marrow, and, 18, G. Mears.

Fees, $9.

M. H. HAAS, *Sheriff.*

217 Service acknowledged for Malvina Elliott, W. K. Tabb, John S. Tucker, John B. Whitehead, and A. J. Ford.

July 27, 1881.

THOMAS TABB, *Att'y.*

A copy.
Teste: S. E. BICKFORD, *Clerk.*

VIRGINIA, *Elizabeth City County,* } *To wit:*

I, S. E. Bickford, clerk of the circuit court of Elizabeth City county, do certify that the foregoing subpœna in chancery was issued in the chancery suit of the West Heirs *vs.* Brinkley *et als.*, instituted in July, 1881, to August rules of said court, and that the said suit was dismissed at said August rules, 1881.

S. E. BICKFORD, *Clerk.*

Deposition of John Booker for Plaintiffs.

1st. Q. by att'y for pl't'ffs. State your name, age, residence, and occupation.

Ans. John Booker; age, 34 years; Elizabeth City county, Va., and att'y-at-law by occupation.

2d Q. Where have you resided for most of your life, what official position have you held in Elizabeth City county, how long did you hold such position, and how long have you practiced law?

Ans. Most of my life I have resided in Elizabeth City county. From Jan'y, 1877, to Jan'y, 1878, I was dep. sh'ff of this county. I was admitted to — bar and commenced the practice of law some time in 1878. In Jan'y, 1881, I was elected judge of the county courts of Elizabeth City and Warwick, and held that office till Dec'r 31, 1885.

3d Q. State whether you know that many tracts of land in Elizabeth City county were confiscated, and that the subject of confiscated titles was much discussed in the county, and that the titles to confiscated property *was* regarded as having a cloud resting upon them.

(Objected to as irrelevant and immaterial.)

Ans. Yes; there were a number of tracts of land confiscated in this county, and the subject was much discussed. In such cases a cloud was generally supposed to rest upon the title.

4th Q. In the pl't'ffs' bill they allege that they were induced to accept eight thousand — for the lands sold by them to C.
218 P. Huntington in Dec'r, 1880, by the belief that unless their right could be bought at that price the terminus of the C. and O. R. R. would not be made at Newport's News. State what you know upon that particular subject.

(Objected to for same reasons last given, and also because the testimony of this witness is not the best evidence on this subject.)

Ans. At that time I was associated with Mr. Segar as counsel for the C. and O. R. R. Co. Mr. G. B. West first charged us $30,000 for the interest of himself and sisters, and finally dropped to $20,000. When assured by us that if he held the property at such figures the road would go elsewhere he consented to take $8,000 and clear the title.

(Answer objected to on the ground that the witness' information is hearsay.)

5th Q. How long have you known Geo. B. West, Mrs. W. P. Marrow, Mrs. M. Smith, and Mrs. Elizabeth R. West?

Ans. I have known Mr. Geo. B. West intimately for the last 10 years and have known him all my life. I have only known the others by reputation.

6th Ques. What is the general character of Geo. B. West and his sisters in Elizabeth City county and the town of Hampton?

(Objected to as irrelevant and immaterial.)

Ans. They stand in this community as high in all respects as any set of people can stand.

7th Q. What is their character for truth and veracity, and would you believe them on oath?

(Same objection.)

Ans. I have had the opportunity of knowing that Geo. B. West is one of the most careful men in his statements I ever knew, and on a question of veracity I would believe him as soon as any man I know. His sisters bear the same reputation. Mr. Geo. B. West served on my grand jury for a number of years.

Cross-examination:

(Undertak*ing* without waiving the objection heretofore made.)

1st Q. What do you mean by the expression "clear the
219 title" given in your answer to 4th question of your direct examination?

Ans. It was supposed at that time that, as the West property had been confiscated, *that* on the death of the ancestor the property reverted to the heirs, and out of an abundance of caution we thought it best to purchase any interest they might have in said property.

2d Q. Had it not been decided by the circuit court of the county of Elizabeth City in the chancery suit of Swayne *vs.* Mallory'- Heirs,

&c., that confiscated property which descended to the heir on the death of the ancestor was liable for the debts of the ancestor contracted prior to confiscation?

Ans. I was not in that case, but I have understood that such was Judge Montague's decision. C. K. Mallory died in 1875, and this was after his death. I think it was previous to 1878, because I think Judge Montague died in 1878.

Redirect examination:

1st Q. Was not the suit of Swayne *vs.* Mallory'- Heirs, &c., a suit brought by the creditors of Mallory against the heirs and per. rep. of Mallory to subject his real and personal estate to the payment of his debts?

Ans. This is my impression, and on Thos. Tabb's authority I state it as a fact.

And further this deponent saith not.

JNO. BOOKER.

Deposition of H. C. Whiting.

1st Q. by counsel for def'ts. Were you personally acquainted with J. B. Brinkley, one of the parties to this suit?

Ans. I was.

2d Q. State whether or not he is living or dead.

Ans. Dead.

3d Q. How long has he been dead?

Ans. I should think for nearly a year. He died prior to December last.

Cross-examined:

1st Q. How do you know Mr. Brinkley died at the time you have stated?

Ans. I saw it announced in the papers—in the Baltimore "Sun," I think. He lived in Baltimore, I think. Besides, I was informed of his death by my brother, his former partner, who also resides in Baltimore.

2d Q. I understand, then, the information you have as to his death is derived from others?

Ans. Yes, sir.

220 Re-examined:

1st Q. Is it not a matter of general repute in this section that said Brinkley is dead?

—. I can't say that it is generally known. There are some people who know it.

And further this deponent saith not.

H. C. WHITING.

The Deposition of Wm. H. Kimberly for Defendants.

Counsels for def'ts, in introducing as a witness Wm. H. Kimberly, hereby expressly disclaim any waiver of their exceptions taken to the competency of the pl't'ffs or any of them as witnesses in this cause; but, on the contrary, they reserve all such exceptions and the benefit thereof, the examination of this witness being subject to the decision of the court in that regard and not to be used if said pl't'ffs are held to be incompetent.

1st Q. by counsel for def'ts. How long have you been a resident of this neighborhood?

Ans. I came here in 1861 and have been here ever since.

2d Q. Are you one of the def'ts in this cause?

Ans. I am.

3d Q. Please state whether or not you ever knew of or heard of any claim on the part of the heirs of the late Parker West to that part of the Newport News land which you hold by deed from G. M. Peek, special com'r, and which is fully set forth in your answer, prior to the C. and O. R. R. Co. making Newport News their terminus.

Ans. No, sir.

4th Q. Were you personally acquainted with the late Chas. K. Mallory, and what was his standing as a lawyer and a man, if you know?

Ans. Yes, sir; I was and had considerable business with him; his standing was above reproach.

5th Q. When did the C. and O. R. R. Co. make its terminus at Newport News?

Ans. In the fall of 1881.

Cross-examined by counsel for pl't'ffs:

—. Did you know that the tract of land which you purchased was a part of the tract which had been confiscated by the Government?

Ans. No, sir.

221 2d Q. Did you not know or hear that the lands, or a part of them, of Parker West were confiscated by the Government?

Ans. No, sir.

3d Q. Have you never heard that this was so?

Ans. I had never heard anything about the property prior to the railroad coming to Newport News. Since these suits have been coming up I have heard of it.

4th Q. When you purchased did you have the title to this property examined?

Ans. The property was purchased by Mr. Fulton and Mr. Phoebus—24 acres—and I purchased from them 8 acres, which was one-third. The matter of title was left in the hands of Mr. Fulton and Mr. Phoebus. I cannot tell you more about it, as it has been a long time—16 years ago.

5th Q. Was Mr. Tabb your counsel in this matter?

Ans. Yes, sir.

6th Q. When the railroad was about to come to Newport's News did you know or did you hear that there was some difficulty as to the title to the Newport's News property?

Ans. I had not the slightest idea that there was any difficulty.

7th Q. Were you not made a party to a suit brought by the heirs of Parker West about that time?

Ans. Well, if I was that was the first time I heard of it.

8th Q. You heard about it about that time; am I right?

Ans. I could not help it, if I was a party to the suit.

9th Q. What did you hear was the trouble or difficulty about the title at that time?

Ans. The record will show that better than I can tell. It was five years ago.

And further this deponent saith not.

WM. H. KIMBERLY.

Deposition of J. Heffelfinger for Def'ts.

The note made by counsel for def'ts in reference to Wm. H. Kimberly as a witness here repeated in reference to Mr. Heffelfinger.

1st Q. by counsel for def'ts. How long have you resided in Elizabeth City county?

Ans. I am now 45 years old, and have resided in Elizabeth City county 20 or 21 years.

2d Q. State whether or not you ever purchased any of the Newport's News land known as the West farm. If so, from whom did you purchase it, when, and at what price?

(Question objected to by counsel for pl't'ffs on the ground that land purchased by witness is not in controversy in this suit.)

222 Ans. I purchased 6 acres in April, 1879—2 acres from B. M. Johnson, 2 acres from S. J. White, and 2 acres from —— Tennis, executor of T. S. Tennis. The price paid was $67.45 per acre.

3d Q. How does the purchase price happen to be $67.45?

Ans. That was the price asked by the sellers. Mr. Peek, in my presence, offered this land to another gentleman in this town for the amount then due on the land in the suit in which it was sold. He stated that the purchasers did not wish to make any further payments and would transfer their title to any one completing the payments. The gentleman to whom it was offered declined to take it, and I then agreed to purchase it on the terms named.

4th Q. Have you sold this land; and, if so, to whom did you sell it, and at what price?

Ans. I sold it to C. P. Huntington, in Dec., 1880, for $300 per acre.

5th Q. State whether or not he paid you all the purchase-money.

Ans. He did.

6th Q. Please state whether or not you ever heard of any claim made by the heirs of the late Parker West to this land or any part of the Newport News land; and, if you have, when did you first hear of it?

(Counsel for pl't'ffs objects to all the foregoing questions and answers of Mr. Heffelfinger concerning the tract of 6 acres of land which he purchased, inasmuch as the said tract of land is not in controversy in this suit and is not claimed by the heirs of Parker West, and he objects to so much of question No. 6 as refers to the 6 acres of land.)

Ans. I heard of some claim a few months after I sold to Mr. Huntington. I have no recollection of ever having heard of it before that time. There was nothing in my mind at the time I purchased it to prevent me from thinking I had a good title.

Cross-examined by counsel for pl't'ffs:

1st Q. Did you know or hear that a part of the Newport's News land, the property of Parker West, was confiscated by the Government?

Ans. Yes, sir.

2d Q. Was it not a question that was frequently discussed and talked about?

Ans. It was very frequently talked about at the time of the decision of the Supreme Court.

And further this deponent saith not.

JAC. HEFFELFINGER.

223 *Deposition of Emily D. Groome for Def'ts.*

Counsel for def'ts, in introducing as a witness Emily D. Groome, hereby expressly disclaim any waiver of their exceptions taken to the competency of the pl't'ffs or any of them as witnesses in this cause; but, on the contrary, they reserve all such exceptions and the benefit thereof, the examination of this witness being subject to the decision of the court in that regard and not to be used if said pl't'ffs are held to be incompetent or if the said witness is deemed incompetent for any reason whatsoever.

1st Q. Are you the Emma D. Groome one of the def'ts in this cause?

Ans. I am.

2d Q. Please state whether or not you ever knew of or heard of any claim on the part of the heirs of the late Parker West to this Newport News land which you purchased or any part of the Newport News land. And, if so, when did you hear of it?

Ans. I never heard anything until within the last year or so.

3d Q. How far do you live from Newport News?

Ans. It is called 7 miles, and I have been living there 19 years.

And further this deponent saith not.

E. D. GROOME.

Deposition of H. C. Whiting for Def'ts.

The same note is here made by counsel for def'ts in reference to this witness as was made in reference to Wm. H. Kimberly.

1st Q. by counsel for def'ts. Please state whether or not you ever knew or heard of any claim on the part of the heirs of the late Parker West *of the West* to Newport News land. And, if so, when did you first hear it?

(Question objected to by counsel for pl't'ffs.)

Ans. I never heard of any claim until after the railroad was projected or had gotten to Newport's News. I frequently talked with Geo. B. West about the land and the prospects of the speculation proving profitable.

2d Q. You say you never heard of any claim until after the railroad was projected or had gotten to Newport's News. About what time was this?

Ans. About 1880 or 1881.

224 3d Q. These talks you speak of having had with Geo. B. West—were they prior or subsequent to 1880 or 1881?

Ans. They were prior to that time. They were casual inquiries, as we met. We were speculating a long time as to whether the road would come.

Cross-examined by counsel for pl't'ffs:

1st Q. Was there not a good deal of land confiscated in this county by the Government?

(Question objected to as irrelevant.)

Ans. I don't consider that there was a great deal; several farms and town lots of prominent persons.

2d Q. You knew that this land was confiscated?

Ans. Yes, sir.

3d Q. When did you first learn that this land was confiscated?

Ans. Immediately on my return from the war, in 1865. I generally kept posted about what was going on.

4th Q. Do you remember when the Supreme Court of the United States decided the question concerning the rights of heirs in confiscated property that that matter was frequently talked about in this county?

Ans. I do; yes; and I was so much interested that I purchased a copy of the opinion (case of Wallec*k vs.* Van Riswick), and after reading that opinion and getting the opinion of prominent lawyers of this place and elsewhere I was satisfied with my purchase and gave myself no further concern about it.

5th Q. Did you have the title to this property examined?

Ans. Not that I am aware of. There was no question raised at that time.

6th Q. You had no counsel in this matter?

Ans. No, sir; I went directly to Col. Mallory himself, and bought from him as com'r. There were four of us, and we bought 40 acres.

Re-examined by counsel for def'ts:

1st. You sold one-half of your 10 acres to Emma Groome. What became of your other 5 acres?

Ans. The remaining 5 acres I sold to C. P. Huntington.

—. When did you sell to C. P. Huntington, what did he agree to give you for it, and has he paid you all of the purchase-money?

—. In 1880 or 1881; $300 per acre; and he has paid all the purchase-money.

And further this deponent saith not.

H. C. WHITING.

225 EXHIBITS. Filed with the Foregoing Depositions for the Defendants.

No. 1.

Peek, Special Com., to Kimberly—Deed.

This deed, made this 15th day of January, in the year one thousand eight hundred and eighty, between G. M. Peek, special commissioner as hereinafter mentioned, party of the first part, and William H. Kimberly, of Old Point Comfort, Virginia, party of the second part:

Whereas by virtue of two decrees of the circuit court of Elizabeth City county—one pronounced on the 4th day of May, 1871, and the other on the 15th day of November, 1871—in the consolidated chancery suits of Brinkley and Whiting *vs.* Latimer, &c.; Willis and *ux. vs.* Latimer, and Peek *vs.* West, &c.—Charles K. Mallory, Thomas Tabb, and G. M. Peek, special commissioners of the court, appointed in said decrees for the purpose, did, after complying in all respects with the said decrees, make sale in lots and parcels of that certain tract of land of which Parker West died seized, known as "Newport's News," located in the county of Elizabeth City, and described in the proceedings in said causes as bounded by the lands of Parrish, Hamlin's (formerly Burk's), and the James river, upon the terms named in the decree first aforesaid; and Harrison Phoebus, Wm. H. Kimberly, and Joseph G. Fulton, on the first day of April, 1872, became the purchasers of those two parcels of the said tract of land designated as lot No. 4 and lot No. 6, on the plat of Wm. Ivy, surveyor, filed in the papers in said causes, containing 12 acres each, and together 24 acres, and bounded on the north by Pumpkin Hall and the Burk land and on the southwest by James river, said lots running from the river to the Pumpkin Hall and Burk land, as shown by said plat, to which reference is made, at the price of $2,400, of which $120 was paid in cash, and the said purchasers executed their four bonds, each in the sum of $570, payable to the said special commissioners, respectively, in one, two, three, and four years, with interest from the

day of sale; and whereas the said sale, having been reported to the said court, was, on the 4th day of May, 1872, by decree pronounced in said causes, confirmed, and, a part of the purchase-money remaining unpaid, the said court, by decree entered in said causes on the 22d day of October, 1878, directed that the balance due thereof should be deposited in the Marine Bank to the credit of said cause, and upon the filing of the certificate of deposit in the papers in
226 said causes that G. M. Peek, as special commissioner, should execute and deliver to such of the purchasers as should comply with said decree a deed or deeds, with special warranty, for the respective lots or parcels of land so paid for; and whereas the said Harrison Phoebus, Joseph G. Fulton, and Wm. H. Kimberly have made the deposit required by the said decree of the balance due by them on the purchase of the lots aforesaid, with interest to the day of deposit; and whereas the said H. Phoebus, Joseph G. Fulton, and Wm. H. Kimberly, by their deed filed in the papers in the said causes, have partitioned the said lots amongst them, and have assigned to the said Wm. H. Kimberly eight acres of the lot No. 4 as his one-third part of the said purchase, and have directed and requested the said special commissioners to convey to the said Wm. H. Kimberly the said 8 acres laid off and described as hereinafter contained:

Now, therefore, this deed witnesseth: That the said party of the first part, in pursuance of the said decretal order of the 22d day of October, 1878, in consideration of the premises and the sum of eight hundred dollars, paid as aforesaid, the receipt whereof is hereby acknowledged, has given, granted, bargained, sold, and conveyed, and does by these presents give, grant, bargain, sell, and convey, with special warranty, unto the said William H. Kimberly and his heirs forever all that certain lot of land located in the county of Elizabeth City, it being eight acres of the lot No. 4 on the plat of Wm. Ivy, surveyor of the Parker West tract called "Newport's News," filed in the papers in the suits aforesaid, and bounded as follows: On the north by the Burk land, on the southwest by James river, on the west by that portion of said tract conveyed to Mrs. Malvina Elliott, on the east by the remaining 4 acres of the lot No. 4, conveyed to H. Phoebus, to be laid off from lot No. 4, so that the same shall run from front to rear, having a water *from* at the line of survey of $67\frac{17}{100}$ yards and $29\frac{7}{100}$ yards across the rear at the north line; to have and to hold the aforementioned and described property to him, the said Wm. H. Kimberly, and his heirs forever.

Witness my hand and seal this 15th day of January, 1880.

G. M. PEEK, [SEAL.]
Special Com'r.

In the clerk's office of the county court of Elizabeth City county, Sept. 4th, A. D. 1880—

This deed was presented and, being acknowledged by G. M. Peek, special commissioner and party thereto, was admitted to record as the law directs.

Teste: S. E. BICKFORD, *Clerk.*

227 No. 2.

Peek, &c., to Whiting.

This deed, made this 20th day of November, in the year of our Lord 1879, between G. M. Peek, special commissioner as hereinafter mentioned, party of the first part, and H. C. Whiting, party of the second part, all of Elizabeth City county, State of Virginia:

Whereas by virtue of two decrees, — pronounced by the circuit court of Elizabeth City county on the 4th day of May, 1871, and the other on the 15th day of November, 1871—in the consolidated chancery suits of Brinkley and Whiting *vs.* Latimer, &c.; Willis and *ux. vs.* Latimer, and Peek *vs.* West, &c.—Charles K. Mallory, Thos. Tabb, and G. M. Peek, special commissioners of the court, appointed in said decrees for the purpose, did, after complying in all respects with said decrees, make sale in lots and parcels of that certain tract of land of which Parker West died seized, known as "Newport News," located in the county of Elizabeth City and described in the proceedings in said causes, and bounded by the lands of Parrish, Hamlin's (formerly Burke's), and the James river, upon terms named in the decree first aforesaid; and H. C. Whiting, L. H. Selater, Jesse P. Hope, and M. A. Shield, on the 9th day of December, 1871, became the purchasers of that parcel of the said tract of land designated as lot No. 2 on the plat of Wm. Ivy, surveyor, filed in the papers in said causes, containing forty acres, and bounded on the southwest by James river, on the north by the Burke tract, on the east by the Elliott lot No. 3, and on the west by the lot purchased by G. B. West at the price of $4,000, of which the sum of $200 was paid in cash, and for the balance the said purchasers executed four bonds, each in the sum of $950, payable to said special commissioners, respectively, in one, two, three, and four years, with interest from the day of said —; and whereas the said sale, having been reported to the said court, was on the 4th day of May, 1872, by decree pronounced in said causes, confirmed, and, a part of the purchase-money remaining unpaid, the said court, by decree entered in said causes on the 22d day of October, 1878, directed that the balance due thereof should be deposited in the Marine Bank to the credit of said causes; and whereas the said H. C. Whiting has made the deposit required by the said decree of the 22d of October, 1878, of the balance due by him on his said purchase, and the whole of the purchase-money has been paid for the said lot No. 2, and the said court did, by decree pronounced in said causes on the 28th day of April, 1879, direct G. M. Peek, as special commissioner of the court, when the purchase-money should be paid as
228 directed by said decree of October 22, 1878, to convey by deed or deeds, with special warranty, the said lot No. 2 in such undivided parcels and to such persons as their interests appear—that is to say, to H. C. Whiting ten acres thereof:

Now, therefore, this deed witnesseth: That the said party of the first part, in pursuance of said decretal order of the 28th of April, 1879, in consideration of the premises and the sum of $1,000, paid

as aforesaid, the receipt whereof is hereby acknowledged, has given, granted, bargained, sold, and conveyed, and does by these presents give, grant, bargain, sell, and convey, with special warranty, unto the said H. C. Whiting and his heirs forever one undivided fourth part of that certain lot or parcel of land designated as lot No. 2 on plat of Wm. Ivy, surveyor of the Newport News tract of land, of which Parker West died seized, located in Elizabeth City county, and bounded as follows: North by the Burke land, southwest by the James river, east by Elliott's lot, and west by the lot of G. B. West, the part hereby conveyed containing ten acres; to have and to hold the said parcel of land, with the appurtenances thereto belonging, unto him, the said H. C. Whiting, and his heirs forever.

Witness my hand and seal this 20th day of November, A. D. 1879.

G. M. PEEK, [SEAL.]
Special Commissioner.

In the clerk's office of the county court of Elizabeth City county, December 6th, A. D. 1879—

This deed was presented and, being acknowledged by G. M. Peek, party thereto, was admitted to record as the law directs.

Teste: S. E. BICKFORD, *Clerk.*

A copy.

Teste: S. E. BICKFORD, *Clerk.*

No. 3.

Whiting and Wife to Groome.

This deed, made this sixth day of September, in the year of our Lord one thousand eight hundred and seventy-three, between H. C. Whiting and Mollie S., his wife, of the county of Elizabeth City, in the State of Virginia, parties of the first part, and Emma D. Groome, wife of Charles F. Groome, of the county of Warwick, in the State of Virginia, party of the second part, witnesseth:

229 That the said parties of the first part, for and in consideration of the sum of twenty-five hundred dollars, good and lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have given, granted, bargained, sold, and conveyed, and do by these presents give, grant, bargain, sell, and convey, unto the said Emma D. Groome and her heirs forever one undivided eighth part of that certain lot or parcel of land which was purchased of Chas. K. Mallory, Thomas Tabb, and G. M. Peek, special commissioners, under a decree of the circuit court of Elizabeth City county in the consolidated chancery suits of Brinkley, &c., *vs.* Latimer, &c.; West, &c., — ——; Willis, &c., *vs.* Latimer, and Peek *vs.* West, &c., by the said H. C. Whiting and M. A. Shield, J. P. Hope and L. H. Sclater, and particularly described in a plat of Wm. Ivy, surveyor, filed in the papers in said suits, as lot No. 2, containing 40 acres of the tract of land situate in Elizabeth City county

known as the "West farm," the said undivided one-eighth part being one-half the interest of the said H. C. Whiting in and to the said lot No. 2; to have and to hold the above conveyed and described property to her, the said Emma D. Groome, and her heirs forever, and the said H. C. Whiting warrants generally the property hereby conveyed.

Witness our hands and seals this 5th day of September, 1873.

H. C. WHITING. [SEAL.]
MOLLIE S. WHITING. [SEAL.]

In the clerk's office of the county court of Elizabeth City county, September 27th, 1873—

The foregoing deed was received and, being acknowledged by H. C. Whiting, party thereto, was admitted to record.

Teste: L. D. SEYMOUR, *Cl'k.*

A copy.

Teste: S. E. BICKFORD, *Clerk.*

Deed from Peek, Special Com'r, to Whitehead.

This deed, made this 16th day of March, in the year, 1880, between G. M. Peek, special commissioner as hereinafter mentioned, party of the first part, and John B. Whitehead, of the city of Norfolk, Va., party of the second part:

Whereas by virtue of two decrees pronounced by the circuit court of Elizabeth City county—one on the 4th day of May, 1871, and the other on the 15th day of November, 1871—in the consolidated suits of Brinkley and Whiting *vs.* Latimer, &c.; Willis and *ux. vs.* Latimer, and Peek *vs.* West, &c., — Charles K. Mallory, Thomas Tabb, and G. M. Peek, special com'rs of the court, appointed in said decrees for the purpose, did, after complying in all respects with the said decrees, make sale in lots and parcels of that certain tract of land of which Parker West died seized, known as "Newport News," located in the county of Elizabeth City, and described in the proceedings in said causes as bounded by the lands of Parrish, Hamlin (formerly Burke's), and the James river, upon the terms named in the decree first aforesaid; and John B. Whitehead and John S. Tucker, on the 1st day of July, 1872, became the purchasers of that parcel of the tract of land designated as lot No. 8 on the plat of Wm. Ivy, surveyor, filed in the papers of said causes, containing 20½ acres and bounded on the southwest by James river, on the north by the Pumpkin Hall tract, on the east by lot No. 9, sold under said decrees in said suits to T. S. Tennis and others, and on the west by lot No. 7, sold to Tabb and Marrow, at the price of two thousand and fifty dollars, of which the sum of $150 was paid in cash, and for the balance the said purchasers executed four bonds, each in the sum of $475, payable to said special com'rs, respectively, in one, two, three, and four years, with interest from the day of sale; and whereas the said sale, having been reported to the court, was, on the 2d day of October, 1872, by decree pronounced in said causes, confirmed, and, a part of the purchase-money remaining

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unpaid, the said court, by decree entered in said causes on the 22d day of October, 1878, directed that the balance due thereof should be deposited in the Marine Bank of Norfolk, Va., to the credit of said causes; and whereas the said John S. Tucker has conveyed to the said John B. Whitehead, who has paid all the purchase-money, all his interest in the said lot of land as it appears of record, and directed that a deed *shall* be given to the said John B. Whitehead, who has fully complied with the said decree of October 22, 1878, by making the deposit therein required; and whereas the said court did, by the last-mentioned decree, direct that when the said purchasers shall have made the deposits therein directed they will file the certificates of such deposits in the papers in said causes, and Geo. M. Peek, as special commissioner of the court, should execute and deliver to them or such of them as shall so pay the said purchase-money deeds, with special warranty, for the respective lots or parcels of land purchased by them:

Now, therefore, this deed witnesseth: That the said party of the first part, in pursuance of said decretal order of the 22d
231 of October, 1878, in consideration of the premises and the payment of the said $2,050, with all the interest thereon, has given, granted, bargained, sold, and conveyed, and does by these presents give, grant, bargain, sell, and convey, with special warranty, unto the said John B. Whitehead and his heirs forever all that certain piece or parcel of land located in the county of Elizabeth City, State of Virginia, designated on the plat of Wm. Ivy of the Newport News tract, formerly the land of Parker West, as lot No. 8, containing 20½ acres and bounded on the southwest by James river, on the north by the Pumpkin Hall tract and separated from it by Newport News creek, on the west by lot No 7 on said plat, and on the east by lot No. 9 of the said plat, which latter lot has been conveyed to H. L. Schmelz & Co., J. Heffelfinger, A. J. Ford, James S. Darling, and others, it being the same lot or parcel of land mentioned in the premises to this deed.

Witness my hand and seal this 16th day of March, A. D. 1880.

G. M. PEEK, [——.]
Special Com'r.

In the clerk's office of the county court of Elizabeth City county, March 24th, A. D. 1880—

This deed was presented this day and, being acknowledged by Geo. M. Peek, special commissioner, party thereto, was admitted to record as the law directs.

Teste: S. E. BICKFORD, *Clerk.*

A copy.

Teste: S. E. BICKFORD, *Clerk.*

EXHIBIT "No. 1" with Answer of A. P. Thom, Trustee, and also EXHIBIT "A B" with his Deposition.

Deed.

This deed, made this ninth day of April, in the year of our Lord eighteen hundred and eighty-five, between John B. Whitehead and Emily A. Whitehead, his wife, of the city of Norfolk, in the State of Virginia, parties of the first part, and Alfred P. Thom, of the said city and State, who has been selected as trustee for the purposes and objects hereinafter mentioned, party of the second part, witnesseth:

That the said John B. Whitehead and Emily A. Whitehead, his wife, in order to accomplish the purposes and objects herein-
232 after set forth and described and in consideration of five dollars to each of them in hand paid by the said party of the second part, do grant unto the said Alfred P. Thom, with general warranty, the following property, to wit:

(MS. record pages 483 to 499, inclusive, omitted.)

And also all the one undivided half interest in and to that certain piece or parcel of land lying and being in the county of Warwick and State of Virginia situated about half way between the piers at Newport News and the point, the same consisting of about twenty and a half acres of water front, the same being laid off into lots, the other undivided half part being owned by John S. Tucker.

(MS. record pages 501 to 507, inclusive, omitted.)

Witness the following signatures and seals.

JNO. B. WHITEHEAD. [SEAL.]
EMILY A. WHITEHEAD. [SEAL.]
ALFRED P. THOM, *Trustee.* [SEAL.]

(Page 509 of MS. record omitted.)

VIRGINIA:

In the clerk's office of the corporation court of the city of Norfolk, on the 9th day of April, 1885—

This deed was received and, upon the certificates of acknowledgement thereto annexed, admitted to record.

Teste: SAMUEL KIMBERLY, *C. C.*,
By P. X. SMITH, *D. C.*

A copy.
Teste: SAMUEL KIMBERLY, *C. C.*

Deposition of Wm. S. Howard for Def'ts.

Ques. 1 by defendants' counsel. State your name, your age, and residence.

Ans. William S. Howard; 47 years and 6 months; Hampton, Va.

Ques. 2. What has been your occupation, until the commencement of your present sickness, for the last 20 years?

Ans. I was clerk of the courts of Elizabeth City county from
233 1865 until December, 1870. About the spring of 1871 I went into the office of Col. C. K. Mallory, who was a prominent lawyer of this place. I remained there until his death, in 1875. After that I have been dealing principally in real estate. I have also practiced law part of the time.

Ques. 3. Examine Deed Book No. 2, page 391, records of county court of Elizabeth City county, and examine the contract there recorded, bearing date 7th of April, 1871, between Parker West and G. B. West (a copy of which contract is herewith filed as a part of this question), and also examine contract on page 390, same date, between Parker West and A. J. Ford (a copy of which is herewith filed as a part of this question), and state whether or not you have ever seen the originals of these contracts; and, if so, state what you know in regard to them.

(These contracts are not in the papers of the cause.)

Ans. I took the original of these contracts to Richmond at Col. Mallory's request to obtain the signature of Parker West to the same. Col. Mallory, representing Mr. Parker West, requested me to take them there for his signature. The contracts were drawn by Col. Mallory. They may have been in my handwriting, but I am satisfied it was at his dictation.

(The foregoing question and answer is objected to as irrelevant and immaterial, and for the further reason the land of Parker West in question having been confiscated he could make no valid contract therefor.)

Ques. 4. You state that Col. Mallory represented Mr. Parker West in these sales. State, if you know, who represents him in the suits referred to in said contracts.

Ans. Col. C. K. Mallory represented him in the suits referred to in said contracts—Brinkley *vs.* Latimer and West, (2) Willis and Wife *vs.* Latimer, &c., (3) J. L. Peek *vs.* West, &c.

Ques. 5. Do you remember when Mr. Parker West died?

—. I think he died in 1872.

Ques. 6. After the death of Mr. Parker West state, if you know, who represented his heirs-at-law in these suits.

Ans. Mr. Geo. B. West frequently visited the office of Mr. Mallory after the death of his father on business appertaining to the sale of the lands as his attorney and the att'y for the heirs. I heard Col. Mallory say he represented them and that he intended to charge them a big fee for selling the land.

(The above answer is objected to in so far as it undertakes to
234 state the declarations of Col. Mallory; also objected to as irrelevant and in so far as it undertakes to bind the heirs of Parker West, and especially those who were not present.)

Ques. 7. What was Col. Mallory's standing at the bar at this time?

Ans. He was very prominent. The confidence of the people was almost unlimited in him.

Ques. 8. Do you know the lands which are the subject of controversy in this suit? What would those lands be worth if the railroad had not gone to Newport's News?

Ans. I do know the lands, and I think $30 or $35 an acre would have been a good price if the railroad had not gone there.

Ques. 9. State whether or not you ever heard that the West heirs proposed to make any claim to these lands; and, if so, when did you first hear of it.

(Question objected to.)

Ans. I never heard that they proposed to make any claim until the railroad got there.

Ques. 10. Please look at the book marked Ch'y R. Docket Cir. Ct. Look at page —. I find the following memoranda: "Process to Aug't rules, 1870, Joseph *P.* Brinkley *vs.* Thomas Latimer, Parker West, C. W. Hickman, W. S. Howard, trustee in his own right, Jas. E. Turner, trustee, Jno. Latimer, W. R. Willis and Jane C., his wife, Lerida Godwin, Lelia Godwin (inf'ts), John A. Curtis, and ——, assignee of said J. *S.* Curtis, bankrupt; John L. Peek *vs.* Parker West and Geo. B. West, trustee." Now, please state in whose handwriting are these memoranda.

Ans. They are in my handwriting.

Ques. 11. State whether or not the process in these suits was ever served on Parker West.

(Question objected to, as the record on the process returned executed is the best evidence.)

Ans. They were, or the cases would not have been ready for the court unless the process had been executed or service acknowledged.

Ques. 12. Look at that book and say whether or not it was your habit or custom to make any note of the return of the process?

Ans. I took the rules on the papers generally and not on that book.

Ques. 13. You have stated that Col. Mallory represented
235 Mr. Parker West in these suits. State, if you can, and as near as you can, when he first began to represent him in them.

Ans. When they came to be heard in court.

Ques. 14. Try and refresh your memory from conversations had with Col. Mallory, or from any other source, whether or not Mr. Parker West had not conferred with him (Col. Mallory) as to representing him in them about the time the suits were first instituted to subject these lands to the payment of his (Parker West's) debts?

(Question objected to (1) as improper testimony, Parker West being dead, and any declaration of Col. Mallory could neither bind him (Parker West) or his heirs; (2) because the heirs of Parker West, as shown by the record, were not made parties to the said suits; (3) because Parker West had no interest of any kind in the confiscated lands now in controversy; (4) because record discloses that he was

the att'y of record for a large number of creditors who were seeking to subject this land to their debts.)

Ans. He represented him from the date of the deed from Parker West to Geo. B. West, trustee. Mr. Parker West came to see him then, and Col. Mallory drew the deed.

Ques. 15. State whether or not Mr. Parker West did not specially retain Col. Mallory in regard to the sale of these lands.

(Question objected to as in no way binding the heirs of Parker West, and as immaterial.)

Ans. I understood so. He told Mr. Geo. B. West, when he made his first purchase, that he gave him the choice of the land at what he would ask for the residue because he represented his father. Mr. Geo. B. West then asked him to take in part payment of his purchase a legacy left him by Mrs. Watson, which Col. Mallory agreed to look out for.

Ques. 16. Was or was not the land which Geo. B. West purchased the most valuable of the whole Newport News tract?

Ans. I considered it was.

(Counsel for the plaintiffs here makes special objection to all of the foregoing answers of witness not based upon his own knowledge and all of the answers concerning the representations or declarations of Charles K. Mallory as being the attorney for Parker West and his heirs made when they were not present.)

236 Cross-examination by plaintiffs' counsel:

1 Cross-ques. How long have you been living in Elizabeth City county?

Ans. I moved to it in 1847 or '48 from the adjoining county of York.

2 Ques. You are, then, pretty well acquainted with the citizens of this county, character of the lands, and titles to the same?

Ans. I am.

3 Ques. Did the U. S. Government confiscate a great deal of property during the late war in this county?

Ans. Yes; it did.

4 Ques. Was the question as to the right of purchasers in confiscated property and of the heirs of those whose property was confiscated a subject of frequent conversation and discussion in this community?

Ans. Not until the last five or six years.

5 Ques. What gave rise to the discussion within the last five or six years?

Ans. The case of Peek's Heirs *vs.* Cummings first started it.

6 Ques. Do you know when the case of Wallach *vs.* Van Riswick (Supreme Court of the U. S.), settling the question as to the rights of heirs in confiscated property, was decided?

Ans. I can't say I do know what year.

7 Ques. Do you know what counsel represented most of the purchasers of the Newport's News lands?

Ans. Very few of the purchasers were represented at all. They came and bought the land and paid the money, and that was the end of it.

8 Ques. Do you know any of these purchasers who were subsequently represented by counsel in any negotiation about these lands?

Ans. In a controversy between Mr. Groome and the railroad Mr. Groome was represented, and he is the only one I know of, except recently in a case of the West Heirs *vs.* Myself and different parties. I am no party to this suit. I refer to the late ejectment suit. I own a quarter of an acre of this land in controversy.

9 Ques. Can you state the month of the year 1871 you went to the office of Col. Mallory?

Ans. January, '71, I think.

10 Ques. Did you see Parker West at the office of Col. Mallory during the year 1871?

Ans. I saw him there when he made that deed to Geo. B. West, trustee.

11 Ques. You were not at that time staying in Col. Mallory's office, were you?

Ans. No; I was not.

237 12 Ques. Please state when and where and who was present at the conversation between Charles K. Mallory and Geo. B. West referred to in your answer to the 15th question.

Ans. I was present. It was at the time he made his first contract with Col. Mallory. Col. Mallory sold the land, but the contract was in Mr. West's name.

13 Ques. Who else was present?

Ans. Geo. B. West, Col. Mallory, and myself.

14 Ques. Who else?

Ans. No one else.

15 Ques. When was this?

Ans. This was at the date of the contract of Parker West to Geo. B. West, which I went to Richmond to get Mr. West's signature to.

16 Ques. Did you during the year 1871 see Parker West at any time in company with C. K. Mallory, either at his office or elsewhere?

Ans. I do not think I did.

17 Ques. Did you during the year 1870?

Ans. I saw him when he made that deed to Geo. B. West, trustee.

18 Ques. Do you not know that the deed referred to by you was made prior to the institution of the suits of Brinkley *vs.* Latimer, &c.; Peek *vs.* —?

Ans. I do.

19 Ques. Were you well acquainted with Parker West?

Ans. Yes, sir.

20 Ques. Did you have much conversation with him when you went to Richmond to have the contracts signed?

Ans. I did not.

21 Ques. Do you know the fact that Col. Mallory brought the original suit of Brinkley *vs.* Latimer and West and others to subject the lands of Parker West to the payment of a certain judgment,

and that he represented a large number of creditors in the consolidated suits?

Ans. I do.

22 Ques. Did you keep the books of Col. C. K. Mallory?

Ans. I did not.

23 Ques. As you did not see Parker West and C. K. Mallory together at any time during the years 1870 and 1871, why do you say that Col. Mallory represented Parker West in the suits referred to?

Ans. He employed him as his attorney to look out for his interests when he made the deed to Geo. B. West, trustee.

24 Ques. Is that the reason you have for supposing or assuming that he was authorized to represent him in the said suits?

238 Ans. Not entirely. Before Mr. Turner's death (who was the clerk in Col. Mallory's office preceding me) he frequently sent him to see Mr. Parker West to find out his wishes about the sale of this land.

25 Ques. How do you know this?

Ans. Mr. Turner, when he came back from Mr. West, would tell me of his conversation with Mr. West.

26 Ques. When was this?

Ans. This was in 1869 and in 1870.

27 Ques. This, then, was before the institution of the suits referred to?

Ans. Before and since the suits were brought in the summer — 1870.

28 Ques. Where is Mr. Turner?

Ans. He died in the fall of 1870.

29 Ques. Have you any other reason for saying Charles K. Mallory represented Parker West in said suits?

Ans. None other than the fact that he asked him to look out for his interest when he made that deed to Bev. West, and the fact that Mr. Turner visited him at Col. Mallory's request, frequently stating to me what Mr. West wanted Col. Mallory to do with his lands.

30 Ques. You never at any time heard Parker West state that Mr. Mallory represented him in these suits?

Ans. I never did.

31 Ques. You never, *did you*, at any time heard Col. Mallory, in the presence of Parker West, state that he represented him in these suits, did you?

Ans. The suits were not brought at the time he asked Mr. Mallory to look out for his interests.

Here repeat the question.

Ans. I never did.

32 Ques. Did you at any time after these suits were instituted see Mrs. Missouri Smith, Miss Lizzie West, or Mrs. William P. Marrow?

Ans. I frequently saw Miss Lizzie West, but saw the others occasionally.

33 Ques. Do you —, of your own knowledge, of any employment

by these ladies of Col. C. K. Mallory to represent them in these suits?

Ans. No; I do not, unless it was through their brother, Geo. B. West.

34 Ques. Do you know, of your own knowledge, of any employment of Charles K. Mallory by Geo. B. West to represent him in these suits?

239 Ans. Mr. Geo. B. West frequently visited Col. Mallory's office to see about the sale of his father's land and to consult him, as I thought, as his attorney.

35 Ques. Did you ever hear him make any contract with Charles K. Mallory to represent him in these suits?

Ans. No.

36 Ques. Do you know Geo. B. West well?

Ans. I do.

37 Ques. What is his general reputation for truth and veracity in the community?

Ans. I have never heard him questioned.

(This question and answer is objected to as being entirely irrelevant.)

38 Ques. You have said you do not know, of your own knowledge, of any employment of C. K. Mallory by Mrs. Smith, Miss West, and Mrs. Marrow to represent them in these suits unless through their brother, Geo. B. West. Do you, of your own knowledge, know of any such employment of C. K. Mallory by G. B. West for his sisters to represent them in said suits?

Ans. No; I do not.

39 Ques. Do you remember about the time of the sale *of* the West heirs of their interest in certain confiscated property to Mr. Huntington?

Ans. I heard of it.

Re-examination:

—. You have given certain reasons why you knew that Col. Mallory represented Parker West during his life and his heirs-at-law after his death. Did or did not Col. Mallory, to your own knowledge, represent them in these suits?

Ans. He represented them, and he certainly understood he was to get a big fee. I heard him say so.

Ques. 2. State whether or not it is a fact that even before you went out of the clerk's office in December, 1870, you were very intimate with Col. Mallory and very familiar with his legal business, especially in all suits of importance, such as these were.

Ans. I was; no one was more so.

Re-examination:

Ques. 1. In your answer to the 23d, 24th, and 29th cross-questions you give your reasons in detail why you say C. K. Mallory represented Parker West in said suits. In your re-examination, an-

and that he represented a large number of creditors in the consolidated suits?

Ans. I do.

22 Ques. Did you keep the books of Col. C. K. Mallory?

Ans. I did not.

23 Ques. As you did not see Parker West and C. K. Mallory together at any time during the years 1870 and 1871, why do you say that Col. Mallory represented Parker West in the suits referred to?

Ans. He employed him as his attorney to look out for his interests when he made the deed to Geo. B. West, trustee.

24 Ques. Is that the reason you have for supposing or assuming that he was authorized to represent him in the said suits?

238 Ans. Not entirely. Before Mr. Turner's death (who was the clerk in Col. Mallory's office preceding me) he frequently sent him to see Mr. Parker West to find out his wishes about the sale of this land.

25 Ques. How do you know this?

Ans. Mr. Turner, when he came back from Mr. West, would tell me of his conversation with Mr. West.

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Ans. This was in 1869 and in 1870.

27 Ques. This, then, was before the institution of the suits referred to?

Ans. Before and since the suits were brought in the summer — 1870.

28 Ques. Where is Mr. Turner?

Ans. He died in the fall of 1870.

29 Ques. Have you any other reason for saying Charles K. Mallory represented Parker West in said suits?

Ans. None other than the fact that he asked him to look out for his interest when he made that deed to Bev. West, and the fact that Mr. Turner visited him at Col. Mallory's request, frequently stating to me what Mr. West wanted Col. Mallory to do with his lands.

30 Ques. You never at any time heard Parker West state that Mr. Mallory represented him in these suits?

Ans. I never did.

31 Ques. You never, *did you*, at any time heard Col. Mallory, in the presence of Parker West, state that he represented him in these suits, did you?

Ans. The suits were not brought at the time he asked Mr. Mallory to look out for his interests.

Here repeat the question.

Ans. I never did.

32 Ques. Did you at any time after these suits were instituted see Mrs. Missouri Smith, Miss Lizzie West, or Mrs. William P. Marrow?

Ans. I frequently saw Miss Lizzie West, but saw the others occasionally.

33 Ques. Do you —, of your own knowledge, of any employment

by these ladies of Col. C. K. Mallory to represent them in these suits?

Ans. No; I do not, unless it was through their brother, Geo. B. West.

34 Ques. Do you know, of your own knowledge, of any employment of Charles K. Mallory by Geo. B. West to represent him in these suits?

Ans. Mr. Geo. B. West frequently visited Col. Mallory's
239 office to see about the sale of his father's land and to consult him, as I thought, as his attorney.

35 Ques. Did you ever hear him make any contract with Charles K. Mallory to represent him in these suits?

Ans. No.

36 Ques. Do you know Geo. B. West well?

Ans. I do.

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Ans. I have never heard him questioned.

(This question and answer is objected to as being entirely irrelevant.)

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Ans. No; I do not.

39 Ques. Do you remember about the time of the sale *of* the West heirs of their interest in certain confiscated property to Mr. Huntington?

Ans. I heard of it.

Re-examination:

—. You have given certain reasons why you knew that Col. Mallory represented Parker West during his life and his heirs-at-law after his death. Did or did not Col. Mallory, to your own knowledge, represent them in these suits?

Ans. He represented them, and he certainly understood he was to get a big fee. I heard him say so.

Ques. 2. State whether or not it is a fact that even before you went out of the clerk's office in December, 1870, you were very intimate with Col. Mallory and very familiar with his legal business, especially in all suits of importance, such as these were.

Ans. I was; no one was more so.

Re-examination:

Ques. 1. In your answer to the 23d, 24th, and 29th cross-questions you give your reasons in detail why you say C. K. Mallory represented Parker West in said suits. In your re-examination, an-

swer to 1st question, you use the language, "He represented them." What act, to your own knowledge, did Col. Mallory do au-
240 thorizing you to say he represented them other than you have already testified to?

Ans. He put the lands at Newport's News at fabulous prices and held them until he got them. They were certainly fabulous prices in these days.

Ques. 2. What do you mean by saying he put the land at fabulous prices; were they not sold by three commissioners?

Ans. He did the selling and put the prices, the other commissioner- acquiescing in what he did.

Ques. 3. Is this your reason for saying he represented them in these suits?

Ans. I think that is one reason why we may consider he represented them. I have already given other reasons.

And further this deponent saith not.

WM. S. HOWARD.

Deposition of Geo. M. Peek for Defendants.

1 Ques. by defendants' counsel. State your name, age, residence, and occupation.

Ans. Geo. M. Peek; age, 46 years; Hampton; attorney-at-law.

2 Ques. State whether or not you were counsel in the chancery cause of John L. Peek *vs.* Parker West and Geo. B. West, trustee, which was instituted at August rules, 1870, circuit court, county of Elizabeth City.

Ans. Yes, sir; I represented the plaintiff.

3 Ques. It appears that the said suit was consolidated with the suits of Brinkley *vs.* Latimer and West and Willis and Wife *vs.* Latimer and others, and at the May term of the circuit court of Elizabeth City county, to wit, on the 4th day of May, 1872, a decree was entered in the consolidated causes beginning as follows: "The death of Parker West being suggested, on the motion of William P. Marrow and Mary E., his wife, Elizabeth R. West, Geo. B. West, and M. Smith and Missouri, his wife, the said Mary E. Marrow, Elizabeth R. West, G. B. West, and Missouri Smith being the heirs-at-law of the said Parker West, to be made parties defendant to these causes, the said William P. Marrow, M. E., his wife, E. R. West, G. B. West, and M. Smith and Missouri, his wife, are hereby made parties defendants to these causes, with leave to file their answers," &c. Now, look at the original of said decree (which is here handed the witness) and state in whose handwriting the original decree is written.

Ans. In my handwriting.

Ques. 4. State how you came to write that decree.

Ans. I had heard of the death of Parker West and went to see Col. Mallory, who has represented him, to confer with him and to as-
241 certain whether the sales which had been made by the commissioners could be confirmed at that term, I stating to him that Mr. West was dead. He said that he would fix it, and

requested me to sit down and write the decree at his dictation. I did so. He stated that he represented the heirs of Parker West and there would be no trouble about the confirmation of the sale.

(So much of the foregoing answer as undertakes to state the declarations of Col. Mallory is objected to.)

Ques. 5. State whether or not you ever had any interview with the heirs of Parker West in which the matter of the Newport's News land was referred to. If so, state when and where it occurred, what passed between you, and how you regarded that interview.

Ans. I had an interview with Miss Elizabeth R. West and Geo. B. West at Mrs. Stoar's, in Hampton. I am unable to locate the time; it was not earlier than 1876; it may have been later. Dr. Hope requested me to go there and see Miss West and prepare a contract for the sale of a piece of 5 acres of the Newport News tract, which he had agreed to sell to her, stating that she would tell me the terms of the contract. I went to see her, stated my business, and she asked me if I thought her purchase of this piece of land would affect her right to recover under the decision of Wallach *vs.* Van Riswick. I told her I was not prepared to give her a decided opinion, but thought it would. We discussed the matter for some time, her brother, Geo. B. West, engaging in the conversation. I then said, You are barred from any recovery by reason of being parties to the suit in which the land was sold. They said they were not parties, and that no summons had been served upon them. I insisted they had been made parties to the suit. I believe that was all that transpired, that I can recollect.

Ques. 6. State whether or not you ever heard or knew of any proposed action on the part of the West heirs to recover these lands until the institution of the ejectment suit for that purpose in 1885.

Ans. I heard Geo. West say, about the time they sold to Huntington for $8,000 their right and title to the lands he purchased, that they claimed the other lands also. I never heard of any claim after the conversation with Miss West and her brother until after the sale to Huntington.

Ques. 7. Are you not the present county judge of the counties of Elizabeth City and Warwick?

Ans. Yes, sir.

Ques. 8. Have you not resided here all your life, and have you not been a practitioner at the bar of these two counties for the last 18 years?

242 Ans. I have been here all my life, and have been practicing here since 1868 in the courts of Elizabeth City and Warwick.

Ques. 9. State whether or not you have been well informed as to all matters pertaining to the sales of these lands at Newport's News and the purchasers thereof since 1872 up to the present time.

Ans. I have.

Ques. 10. Be kind enough to state whether or not you ever approached Mr. John B. Whitehead or John S. Tucker in regard to the purchase of their lands at Newport's News, which is a part of

the land now in controversy; if so, state when it was and what passed between you.

(Question objected to as irrelevant and immaterial.)

Ans. I went to see Mr. John B. Whitehead just before this sale of the Newport's News lands to Mr. Huntington—I think about the year 1879—to know what he would take for his land at Newport's News. He said he would take what he gave for it with 6 per cent. on his money. He put it in writing, gave me 10 days in which to decide, and I left him.

Ques. 11. Was the party for whom you were acting well able to purchase these lands if he had deemed them a desirable investment at that time?

(Objected to.)

Ans. He was.

Ques. 12. What was his reason for not buying?

Ans. The price was too high.

Ques. 13. Do you know how much land he represented there at that time?

Ans. Twenty acres and a half.

Ques. 14. In the decree of May 4th, 1872, it appears that a fee of $200 was allowed you; please state how that fee was allowed.

Ans. The fee was allowed by the court upon written consent of the heirs of Parker West, by their counsel, Col. Mallory. The court stated when the request was made to allow the fee that the estate was not insolvent and he could not allow the fee unless the defendants consented to it, and suggested that a written consent be filed in the papers. Col. Mallory wrote it and signed it and it was filed with the papers along with the decree.

(So much of the foregoing answer as undertakes to state what was in the paper referred to is objected to, and the paper itself is called for.)

243 Ques. 15. State, if you know, how much Mr. Huntington paid for the Newport's News lands when he purchased them.

Ans. I think it was $300 an acre he gave for the West lands.

Ques. 16. At that interview at Mrs. Stoors', which was spoken of, when you told Miss Elizabeth R. West and Geo. B. West that they had been made parties to the suits, did you not tell them who had represented them in making them parties?

Ans. I think I did. I think I told them that Col. Mallory represented them. My recollection is that I did.

Ques. 17. What was the standing of Col. Mallory at the bar of this county and Warwick.

Ans. He was considered the leader of the bar here at that time. He was a man of high character and a lawyer of ability.

Cross-examination by pl't'ffs counsel:

1st Cross-ques. Was there not much discussion and a great variety of opinion among lawyers and laymen as to the rights of heirs,

creditors, and others in the property in this county which had been confiscated by the Government?

Ans. There was after the decision of Wallack *vs.* Van Riswick. Before that I don't think there was. There was before that no difference of opinion among the lawyers here as to the rights of the parties.

Ques. 2. Was there not after that decision great uncertainty as to titles to confiscated lands and great uneasiness felt by those who had purchased such lands?

Ans. There was considerable uneasiness felt by purchasers of confiscated property, and it was generally considered that there was a cloud over the title to confiscated lands when sold by the ancestor during his lifetime; that the title was considered defective in such cases.

Ques. 3. The original decree of May the 4th, 1872, has certain interlineations. In whose handwriting are these interlineations?

Ans. They are in my handwriting.

Ques. 4. Have you any knowledge of Col. Mallory representing Parker West after the suits in which these confiscated lands were sold were instituted?

Ans. I don't know that Parker West employed him, but I do know that Col. Mallory represented him in these suits. I went to see him as Mr. West's att'y before I instituted the suit for John L. Peek.

Ques. 5. In what way did he represent him? Did he file any answer for him or do any other act disclosed by the record in those suits to indicate that he was his attorney?

Ans. I do not know if he filed any answer or did any act
244 which appears of record as the att'y for Parker West, but he represented the interest of Parker West in the sales that were made of his lands, selecting the Newport's News tract to be sold and the lots in Hampton, because it was to the interest of Mr. West and at his request, as Col. Mallory said, that these should be sold first.

Ques. 6. Did you see Parker West any time after these suits were instituted?

Ans. No, sir.

Ques. 7. The inference that Col. Mallory represented Parker West is not from anything Parker West said to you, is it?

Ans. No, sir.

Ques. 8. What particular act did Col. Mallory do which led you to believe that he represented Parker West? Was it because you knew that he had been a friend of Parker West's before that time—possibly his counsel before that time?

Ans. I do not remember any particular act that he did as counsel for Parker West. I did not know that he and Mr. West were particular friends. I went to see Col. Mallory before I instituted the suit and he told me he was Mr. West's attorney.

Ques. 9. You knew the fact that Col. Mallory, as counsel for Brinkley, had instituted the suit to subject the lands of Parker West for his debts, did you not?

Ans. I am unable to say now whether I did or not. I suppose I must have known it, though.

Ques. 10. You know nothing of your personal knowledge of the employment by Parker West of Col. Mallory in his lifetime or by his heirs after his death, do you?

Ans. I do not.

Ques. 11. Do most of the purchasers of the Newport's News lands reside in this county, and did they at the time of the purchase?

Ans. Yes, sir.

Re-examination:

Ques. 1. State whether or not Geo. B. West, after this interview to which you have referred, purchased the Hope land. And what did he give him for it?

Ans. He did, but I cannot remember the price. The deed will show what he gave for it.

And further this deponent saith not.

G. M. PEEK.

G. M. PEEK, being recalled for defendants, testifies as follows:

By defendant's counsel:

245 Q. Look at this deed from Marrow and wife and others to Thomas Tabb, trustee, bearing date 19th April, 1872, which deed is here put in evidence, marked "X," and state, if you know, to what the following expression has reference, to wit: "The proceeds of the sale of the Newport's News farm."

(Counsel for the plaintiffs object to the introduction of the deed and any explanation of said deed as irrelevant and immaterial.)

Ans. It has reference to the proceeds of the sale of the land sold in the suits of Brinkley and Whiting *vs.* Latimer and others; Willis and wife *vs.* Latimer, and Peek *vs.* West. Mr. West had three tracts of land, one called Casey's, one called Pumpkin Hall, and one called Newport News. This Newport News tract is the one here referred to and is the only one that has been sold, and the sale referred to is the sale in these suits.

And further this deponent saith not.

G. M. PEEK.

(NOTE BY COPYIST.—The contract between Parker West and George B. West and the contract between Parker West and A. J. Ford, referred to in the deposition of William S. Howard, are not found in the papers of the cause.)

EXHIBIT "X" with Deposition of G. M. Peek.

This deed, made this 19th day of April, 1872, between William P. Marrow and Mary E., his wife; E. R. West, George B. West, M. P. Smith and Missouri, his wife, parties of the first part, — Thomas Tabb, trustee, of the second part, witnesseth:

That the said William P. Marrow and Mary E., his wife; E. R.

West, George B. West, M. P. Smith and Missouri, his wife, parties of the first part, do by these presents grant and convey unto Thomas Tabb, trustee, all that certain tract of land known as "Pumpkin Hall," containing sixty acres, more or less, adjoining the Newport News farm and the lands of Thomas Tabb and C. K. Mallory, formerly Melson's; also that certain tract of land known as Casey's, containing two hundred acres, more or less, bounded by the Burke farm, the lands of Ivy, — Saltford's creek, in trust to secure the prompt and faithful payment of the sum of one thousand five hundred and forty-three dollars and sixty cents, with interest from date at the rate of 10 per cent. per annum, to Thomas E. Milstead, administrator of Wm. Lee, dec'd. It is further stipulated and agreed that the said lien shall not be enforced until it is ascertained
246 whether or not there shall be sufficient coming from the proceeds of the sale of the Newport News farm to satisfy the aforesaid sum of one thousand five hundred and forty-three dollars and sixty cents, with interest thereon, the said sum to be paid from said proceeds of sale if sufficient for that purpose. As to the above debt we do waive the homestead exemption.

Witness the following signatures and seals:

WM. P. MARROW. [SEAL.]
MARY E. MARROW. [SEAL.]
E. R. WEST. [SEAL.]
GEO. B. WEST. [SEAL.]
M. P. SMITH. [SEAL.]
M. SMITH. [SEAL.]

(Page 533 of MS. record omitted.)

In the clerk's office of Elizabeth City county, April 24th, 1872— This deed was received and, together with the certificates annexed, and being stamped with two dollars in U. S. int. rev. stamps and the same being cancelled, was admitted to record.

Teste: E. W. HOLT, *D. C.*

A copy.

Teste: S. E. BICKFORD, *Clerk.*

Agreement of Counsel as to Amount of Money on Deposit in Marine Bank and Citizens' Bank of Norfolk, Va., being—

EXHIBIT "C." Filed with Depositions for Plaintiffs.

Circuit Court of Elizabeth City County.

In Suit of MARROW and WIFE and Others *vs.* BRINKLEY and Others.

It is agreed that statement "D" filed with the plaintiffs' bill, being copy of the account kept at the Marine Bank of Norfolk, Va. (and furnished by said bank), in the consolidated causes of Brinkley *vs.* Latimer and West and Peek *vs.* West, showing a balance on July 1st, 1885, to credit of said causes of $6,241.75, is correct.

It is also agreed that statement "E" filed with plaintiffs' bill, being copy of account kept with Citizens' Bank of Norfolk, Va. (and furnished by said bank), in said consolidated causes, showing balance on July 1st, 1885, to credit of said causes of $2,128.66,
247 is correct, and proof of the said papers is dispinced with, but no objection to the admissibility of the facts mentioned in said papers is waived. On the contrary, the admissibility of the same is expressly excepted to by the defendants as irrelevant and immaterial, and because their introduction is in pursuance of an effort to contradict the record.

BURROUGHS & BRO.,
Att'y- for Plaintiffs.
THOMAS TABB,
Att'y for Defendants.
TUNSTALL & THOM, *Att'ys.*

Following are the decrees which have been entered in this cause:

VIRGINIA:

In the Circuit Court of Elizabeth City County, June 8th, 1886.

WILLIAM P. MARROW and WIFE and Others, Pl't'ffs,
against
JOSEPH B. BRINKLEY and Others, Def'ts.

It is ordered that this cause, which has been duly matured by personal service of process on the resident defendants, and by order of publication duly published and posted against the non-resident defendants, and has been set for hearing by the plaintiffs, and which has been duly removed to this court from the circuit court of Warwick county, be placed upon the docket of this court.

VIRGINIA:

In the Circuit Court of Elizabeth City County, June 10th, 1886.

WILLIAM P. MARROW and WIFE and Others, Pl't'ffs,
against
JOSEPH B. BRINKLEY and Others, Def'ts.

This day came John S. Tucker and presented his petition, which is herewith filed, praying to be admitted as a party defendant in this cause, which motion is granted by the court, and he is accordingly admitted as a party defendant hereto.

Thereupon came Richard B. Tunstall, trustee under deed of assignment from the Franklin Savings Bank of the City of Norfolk, — from the petition (and the exhibit filed therewith) of John S. Tucker that he is substantially interested in the subject-matter of the controversy in this suit, and also moved to be admitted as a party
248 defendant hereto, which leave is granted, and he is admitted a party defendant accordingly.

Thereupon came the defendants, John B. Whitehead, Alfred P. Thom, trustee; William A. Kimberly, John S. Tucker, and Richard B. Tunstall, trustee, and moved the court for leave to file their respective separate demurrers and answers to the bill of complaint in this cause; and the defendants, Charles F. Groome and Emma D., his wife, moved the court for leave to file their joint demurrer and joint answer to the same; and the defendant, Alfred P. Thom, trustee, moved the court for leave to file his supplemental answer to said bill, which leave so prayed for by the said defendants is granted by the court, and all of said demurrers and answers are filed accordingly.

VIRGINIA:

In the Circuit Court of Elizabeth City County, October 26, 1886. In Chancery.

W. P. MARROW and MARY E., His Wife; GEORGE B. WEST, and MISSOURI SMITH, Pl'tffs,

against

JOSEPH B. BRINKLEY, JOHN L. PEEK, JOHN B. WHITEHEAD, ALFRED P. Thom, Trustee; William H. Kimberly, Charles F. Groome and Emma D. Groome, His Wife; George W. Schermerhorn, and George Booker and Others, Def'ts.

This cause, which has been heretofore heard upon the papers formerly mentioned, and also upon the depositions filed on behalf of the various parties, the said depositions having been inadvertently omitted from the enumeration of papers on which the said cause was heard at the time of the last decree herein, came on this day to be again heard upon the papers formerly read, including said depositions, and was argued by counsel.

Whereupon *and* the court, having duly and maturely considered the said cause, is of opinion that the prayers of the said bill should be denied, and doth accordingly adjudge, order, and decree that the said bill be, and the same is hereby, dismissed.

The court doth further order that the defendants recover against the plaintiffs their costs by them about their suit in this behalf expended.

(MS. record pages 540 to 547, inclusive, omitted.)

249 *Deed from Marrow and Wife and Others to George B. West.*

Know all men by these presents that we, William P. Marrow and Mary E. Marrow (*née* West), his wife, of the city of Richmond, Virginia, and Elizabeth R. West and Missouri Smith (*née* West), of the county of Warwick, in the State of Virginia, on the one part, in consideration of the sum of five dollars, the receipt whereof is hereby acknowledged, have remised, released, and forever quitclaimed, and by these presents do for ourselves, our heirs, executors, and admin-

istrators, remise, release, and forever quitclaim, unto the said George B. West, of the said county of Warwick, in the State of Virginia, of the other part, and to his heirs and assigns forever all such right, title, interest, property, claim, or possession, either at law or in equity, that we or either of us have or ought to have as the heirs-at-law and distributees of Parker West, late of the county of Warwick aforesaid, deceased, in and to a certain tract or parcel of land situate, lying, and being in the aforesaid county of Warwick, in the State of Virginia, bounded as follows: North by the lands of the Chesapeake and Ohio Railway Company, east by the Old Dominion Land Company, south by the lands of C. P. Huntington, and west by James river, and is the land on which said G. B. West resides, containing ten (10) acres, more or less; to have and to hold said premises unto the said George B. West, his heirs and assigns, to his and their own proper use and behoof forever, so that neither we, the said William P. Marrow and Mary E., his wife, Elizabeth R. West and Missouri Smith, or either of us, or any other person or persons in our names and behalf, can, shall, or will hereafter claim or demand any right or title to the above-described premises or any part thereof, but they and every one of them shall by these presents be excluded and forever barred.

Witness the following signatures and seals this 18th day of June, 1885.

WM. P. MARROW. [SEAL.]
MARY E. MARROW. [SEAL.]
ELIZABETH R. WEST. [SEAL.]
MISSOURI P. SMITH. [SEAL.]

(Page 550 of MS. record omitted.)

In the clerk's office of the county court of Warwick county, the 16th day of July, A. D. 1885—

250 The foregoing writing was presented and, with the certificates annexed, admitted to record.

Teste: H. H. WYNNE, *Clerk.*

A copy.
Teste: WM. H. WYNNE, *D. C.*,
For H. H. WYNNE, *Clerk.*

A true transcript of the record.
Teste: S. E. BICKFORD, *Clerk.*

A copy.
Teste: GEO. K. TAYLOR, *C. C.*

251 *Addition to Record.*

MARROW and WIFE *vs.* BRINKLEY and *als.*

In the Circuit Court of Warwick County. In Chancery.

WILLIAM P. MARROW and MARY E., His Wife; GEORGE B. WEST, and MISSOURI SMITH, Plaintiffs,

vs.

JOSEPH B. BRINKLEY, JOHN L. PEEK, JOHN B. WHITEHEAD, ALFRED P. Thom, Trustee; Wm. H. Kimberly, Martin McDavitt, Chas. F. Groome and Emma D., His Wife; Geo. W. Schermerhorn, Geo. Booker, and Jno. S. Tucker, Defendants.

The answer of John S. Tucker to the bill of complaint against him and others exhibited by Wm. P. Marrow and Mary E., his wife; George B. West, and Missouri Smith in the said circuit court of Warwick county.

This respondent, without waiving the benefit of his demurrer filed in this cause, and reserving to himself any and all benefit of exceptions to the said bill, for answer thereto, or to so much thereof as he is advised it is necessary or material for him to answer, answering, says:

I. He admits the original title of Parker West, as set out in the first paragraph of the bill, to the property therein mentioned, and that said West occupied and held possession of the same as therein alleged. He further admits the institution of the confiscation proceedings referred to in said paragraph, but prays reference to the Exhibit "A" filed with said bill for the particulars, construction, and effect of the same.

252 II. This respondent admits the institution of the proceedings mentioned and referred to in the second paragraph of the bill in the circuit court of Elizabeth City county, but for particular information as to the same and the construction and effect thereof he refers to the certified copy of the record of the proceedings filed with the answer of A. P. Thom, trustee, in this cause, and he makes the said record or certified copy thereof a part of this his answer.

III. This respondent also admits proceedings in said causes referred to in the third paragraph of the bill of the nature therein alleged; but he here again refers to the certified copy of the record thereof for the particulars, construction, and effect of the same.

IV. This respondent also admits the rendition of the decree of May 4th, 1871, but he avers that the land itself and the fee-simple interest therein and no less estate whatever was sold in said proceedings, and the court so intended and directed, as clearly appears from the record thereof.

V. This respondent, further answering, submits that the construction and effect of the confiscation proceedings referred to is a question of law to be determined by the court, and which has been de-

termined by the court, and is not a question of fact requiring answer; but he alleges, in reply to the fifth paragraph of the bill, that the rights of the creditors of the said Parker West could not be and were not in anywise affected by the said confiscation proceedings, the purpose and object of which were only to deprive the said Parker West personally of the enjoyment and use of the confiscated property, and that said proceedings could not therefore affect and were not intended to affect the rights of creditors existing prior thereto; and if this construction of the said confiscation proceedings should not be technically correct or should be in anywise deemed erroneous this respondent alleges and submits to the court that the heirs of Parker West on his death took as heirs and subject to the rights of his creditors, and that in no aspect of the question could the said proceedings deprive the said creditors of their rights.

And this respondent further says that the said circuit court of Elizabeth City county is a court of general and not of limited jurisdiction, and that at the time of the proceedings referred to before the said court the land in question was situated in Elizabeth City county and within the territorial jurisdiction of the said circuit court, and that said court had jurisdiction of the subject-matter and of the said causes; and this respondent here positively denies that the
253 decree of May 4th, 1871, in said causes is absolutely null and void, as charged in the said bill. He denies that at its date, being in the lifetime of the said Parker West, the heirs of the said Parker West were necessary parties to the said suit (the said heirs on the death of the said Parker West duly and properly became parties to the said suit, as will hereinafter appear). This respondent denies that the said decree, or that any proceedings had before or after said decree, or that any acts done in pursuance of said decree, or that the sale made under it, or that the deeds to the purchasers referred to are null and void. On the contrary, he affirms that the same are in every respect valid and binding.

VI. This respondent, in reply to the sixth paragraph of the said bill, admits that the special commissioners therein referred to made reports to the court of the land sold by them, as therein alleged, the report of the land sold to John B. Whitehead and John S. Tucker, said report being stated in the bill as having been made at the subsequent term to that of May, 1872, being made at the October term, 1872.

He further admits that Parker West died intestate the latter part of the year, to wit, in December, 1871. He is informed and believes that George B. West, Elizabeth R. West, Missouri Smith, and Mary E. Marrow were his only children and heirs-at-law. He is also informed that Elizabeth R. West died in the year 1885 intestate, unmarried, and without issue. As to the state of the plaintiffs' knowledge or belief as to any rights of theirs in respect to the confiscated land, and as to any determinations or intentions of the plaintiffs themselves, and from the well-known and admitted facts and circumstances surrounding the matter, and from information and belief derived from such source, this respondent denies the allegation in the bill that "in this condition of affairs the plaintiffs de-

termined to do no act yielding their rights in the premises, and, so far as they know, they have done nothing which could be construed as a waiver of their rights in the confiscated lands of Parker West." On the contrary, this respondent alleges that the said plaintiffs were all thoroughly cognizant of the fact of the said proceedings pending in the said court for the purpose of selling the said lands mentioned in the bill and of the said lands being sold and paid for in the said proceedings, and they had this knowledge at the time thereof.

He further alleges that by a deed of trust executed by them on April 19th, 1872, to Thomas Tabb, as trustee, and duly recorded, they recognized the pendency and validity of the said proceedings and the sales of the said lands therein by devoting their interest in the proceeds of such sales to secure an indebtedness due by
254 them, and long prior to the execution of the said instrument and since then they have been well aware of the object and purpose of the said proceedings, and they knew that the purchasers of the said lands claimed and asserted a perfect title to the same. A copy of the said deed of trust of April 19th, 1872, is filed as an exhibit with the answer of Charles F. Groome and wife in this cause, and the same is hereby specially referred to and made a part of this answer.

And this respondent denies that the heirs of Parker West either have or had rights in the said confiscated lands, and if they are to be considered as having ever had any such rights the same have been lost by them, and the said lands belong to the purchasers at the said sales or to their assignees or grantees.

When the plaintiffs heard of the decision of the Supreme Court of the United States in the case of Wallach *vs.* Ryswick this respondent does not know, but he is advised that said decision in no way conflicted with the action of the said circuit court of Elizabeth City county or with the rulings of the said court since then upon the same subject. If, as the plaintiffs seem to intimate, it is to be considered as having afforded them some new light upon which to base their action or excusing their want of action, which this respondent denies, then it is to be noted that they themselves say that they learned of said decision in 1876, a period of ten years before the institution of this suit.

In reply to the allegation of the bill in regard to the action of C. P. Huntington in 1880 in his purchase of land at Newport News this respondent is informed and believes that the said C. P. Huntington paid to the real owners of the said land, under the deeds for the same made in the said suits, the real value of the said lands, while to the plaintiffs he paid but a pittance, admitting their demands only to the extent of buying from them his peace, and thereby avoiding the expense, vexation, and delay of a lawsuit at a time when he was anxius to utilize the property and make heavy expenditures upon the same for the Chesapeake and Ohio Railroad Company. This respondent is also informed and believes that the said C. P. Huntington had already purchased from the real owners when the plaintiffs set up their claims and demanded pay, and this re-

spondent therefore denies the allegation of the bill in that regard also.

VII. This respondent admits that on the 4th day of May, 1872, the first term of the circuit court of Elizabeth City county after the death of Parker West, a decree was entered in the said consolidated causes, beginning as alleged in said bills. This respondent has no personal knowledge as to the truth of the recitals of the said decree, but he is informed that Charles K. Mallory, a lawyer of the
255 highest standing, did represent the plaintiffs, causing them to be made parties by the said decree, and that said Charles K. Mallory is now dead and has been dead for many years.

This respondent further alleges that the said John B. Whitehead (to whom alone the deed was made for the 20½ acres bought by him and this respondent, and who has since conveyed to this respondent an undivided one-half interest in the same, as hereinafter shown) as well as this respondent were purchasers from the special commissioners in said consolidated causes, and purchased under a decree in said causes more than six months after the date of said decree, and that said sale was confirmed; that they purchased with full confidence in and upon the faith and credit of the recitals and statements of said decree and said record; that they had never heard any question raised as to the truth of the said recitals and statements or any suggestion that the plaintiffs were not in fact parties to the said proceedings; and this respondent is advised that it was not incumbent upon them to look behind the said decree and record, and that they had the right to rely fully upon the truth and accuracy of the same; that at the time this respondent purchased his interest in the said lands and at the time the full purchase price therefor was paid, which was done prior to the conveyance thereof to his trustee, John B. Whitehead, and at the time of such conveyance, which was March 16, 1880, this respondent and his said trustee were in entire ignorance of any claims or pretension on the part of the said West heirs as to said lands or any part thereof, and never heard thereof until long subsequent thereto; and this respondent is advised that, being as aforesaid purchasers for value of said property and without notice of any infirmity in the proceedings in said causes or of any want of verity in recitals, statements, and findings of said decree of May 4, 1872, they are now, and have been at all times since their said purchase was confirmed by the court, absolutely protected by the said record, and no assault can be made thereon by any person who appears upon said record to have been a party thereto which can affect their interests as purchasers; and this respondent further says that even if the pretension of the said plaintiffs as to the truth of the recitals and statements of the said decree were founded in fact the plaintiffs, as above stated, were thoroughly cognizant of the fact that the proceedings were pending under which the said John B. Whitehead and this respondent purchased the land in question, and that the object of said proceedings was to sell the said land; that they stood by in silence and allowed the said purchase to be made without any intimation of any claim whatsoever on their part, and that, on the contrary, as before

256 stated, as early as April, 1872, they recognized the validity of the said proceedings and sales and conveyed their interest in the proceeds of sale of the said land as security for a debt they desired to secure; and this respondent further alleges that the said plaintiffs lived together in the same dwelling at or near Newport's News; that the said George B. West, one of them, was a party defendant in a fiduciary capacity in the said consolidated causes from the very inception thereof and purchased some of the very Newport's News land sold in said causes under decrees in said causes, and that all of the plaintiffs had the same knowledge and information that the said George B. West had; and this respondent further says that the said John B. Whitehead and this respondent would not have purchased had they known of any adverse claims asserted against the property, and circumstances and the situation of the parties have greatly changed in the intervening period. The said Charles K. Mallory, the attorney who represented the heirs of the said Parker West (now plaintiffs in this suit) in the said proceedings, but whose employment and authority they now deny, has since died; the materials for the investigation asked for by the plaintiffs are not now in existence, and no such investigation can be had with due regard to the rights of purchasers who relied with implicit confidence upon the solemn assurance of the court by its record; and this respondent submits that the plaintiffs, having slept upon their pretended rights for a period of fourteen years, are now estopped from setting up any such claims, and this respondent alleges that it was the duty of the said plaintiffs, and the legal obligation rested upon them as against innocent purchasers for value at judicial sales, to have asserted their claims to the said land, if any such they had, with diligence and promptness, and that, having failed so to do, the rights of this respondent as an innocent purchaser for value at a judicial sale cannot now be affected by any claims set up by them.

VIII. This respondent, further answering, alleges, on information and belief, that the said Charles K. Mallory did represent the said plaintiffs at the time of the rendition of the said decree of May 4th, 1872, appearing for them and making them parties to the said consolidated causes, and continued thereafter to represent them in said causes until his death, which occurred in June, 1875, all of which the plaintiffs well knew, notwithstanding their denial in said bill that the person representing them was unknown to them, the said plaintiffs; and this respondent denies that the said Charles K. Mallory was not authorized or employed by the said plaintiffs so to represent them, and he denies all allegations in said bill contrary hereto.

This respondent further denies that the said decree was a
257 fraud upon the plaintiffs or upon the court, or that the plaintiffs in said consolidated causes obtained the benefit of any fraud, or that the defendants in this suit are claiming the benefit of any fraud, or that they rest their title upon a fraudulent decree, or that they are asking the court to become an instrument in perpetuating a fraud. On the contrary, this respondent alleges that said plaintiffs are without standing in a court of equity, that they are

asserting claims without shadow of merit or foundation, and that they are themselves endeavoring to perpetuate, through the instrumentality of this court, a gross fraud upon him, the said respondent.

IX. In response to the ninth paragraph of the said bill, this respondent alleges that it is perfectly competent for parties to be made defendants to chancery causes in the mode pursued by the decree of May 4th, 1872, in said consolidated causes, namely, by voluntary appearance and motion, and that such is the common practice, and that the proceedings for revival referred to in said paragraph are only necessary when emanating from the plaintiffs and directed against defendant as *in invitos* or at least not voluntarily appearing.

X. In response to the tenth paragraph of the bill, in reference to the report of the 23d April, 1880, of George M. Peek, special commissioner, this respondent says that it appears from the allegations of the plaintiffs in the paragraph itself that the checks in question were drawn by the said George M. Peek in favor of these parties, as alleged in said report, and were delivered to the said George B. West, notwithstanding the plaintiffs deny in said paragraph that the said facts are true. Whether the said parties refused to accept them from the said George B. West, or whether they were lost by him this respondent does not know; but it is at least certain from the plaintiff's own allegations that the said George B. West accepted his own as well as the other checks from the said special commissioner without objection.

XI. This respondent admits that in the year 1885 the plaintiffs and Elizabeth R. West instituted an ejectment, as alleged in the eleventh paragraph of the bill, and that on the trial thereof the said plaintiffs submitted to a nonsuit. He admits further that the court overruled the said evidence offered by the plaintiffs for the purpose of attacking the said decree of May 4th, 1872, not deeming it necessary to pass upon the objections raised by the defendants to the competency of the said plaintiffs as witnesses; but this respondent denies that the court ruled that the plaintiffs had appeared
258 in open court in proper person, or that the court ruled that the said decree so alleged (if it be intended so to state or to intimate in the said bill); and he further denies that the defendants in the said action based their defence upon the appearance of the said plaintiffs in proper person, or claimed that the said decree of May 4th, 1872, should be so construed. As hereinbefore shown, this respondent alleges that the said plaintiffs were represented by Charles K. Mallory, as their attorney, at and after the said decree of May 4th, 1872, in the said consolidated causes, and it was so alleged on the trial of the said ejectment suit.

XII. In reply to the twelfth paragraph of the said bill, this respondent denies the allegations therein contained that the recitals in the said decree of May 4th, 1872, as to their appearance, are false, and that the said court at no time in the said proceedings had any jurisdiction over the persons of the plaintiffs; and this respondent again alleges that the said plaintiffs did appear in said suits by their counsel, and were made parties thereto long prior to the purchase of the said land by the said John B. Whitehead and this respondent,

and that the said plaintiffs continued to be represented in the said suits by their said counsel, and that the said court had jurisdiction over the said plaintiffs; and this respondent denies that the decrees referred to in said paragraph are void, but alleges that the same are in all respects valid, legal, and binding.

XIII. This respondent, further answering, says that John B. Whitehead did not convey to A. P. Thom, trustee, the 20½ acres of lot No. 8 of the Newport's News tract, as alleged in the thirteenth paragraph of the said bill, but that he conveyed one-half of the same to the said A. P. Thom, trustee, and the other half thereof the said John B. Whitehead conveyed to this respondent by deed dated December 4, 1885, and duly recorded in the clerk's office of Warwick county court, the said deed reserving a lien on the property conveyed for two certain debts due by this respondent, therein mentioned. A copy of the said deed to this respondent is herewith filed, marked Exhibit "A A," and prayed to be taken as a part of this answer.

XIV. This respondent, further answering, says that he knows nothing of the alleged offer by the plaintiffs of the amount of the purchase-money of the said land referred to in the said bill; that no such offer was made to him, but had such been made it would have been declined. If the said plaintiffs have failed to take money belonging to them in said consolidated causes and on deposit for them it is no concern of this respondent. This respondent
259 would here state that, in regard to such parts of this answer referring in terms only to the plaintiffs and relating to the knowledge or intent or to the conduct or acts of the plaintiffs in and about the land and proceedings and subject-matter in question, he, the said respondent, desires the same to be understood and taken as relating equally to the said Elizabeth R. West, who is now deceased, and he alleges that the same are equally applicable to the said Elizabeth R. West, and he here repeats all such parts of the said answer, including the said Elizabeth R. West therein.

And now, having fully answered, this respondent prays to be hence dismissed with his reasonable costs in this behalf expended.

And he will ever pray, &c.

JNO. S. TUCKER.

WALKE & OLD, *P. D.*

DISTRICT OF COLUMBIA, *City of Washington*, } *To wit:*

This day personally appeared before me, R. H. Evans, a notary public for the city of Washington, in the District of Columbia, John S. Tucker, whose name is signed to the foregoing answer in chancery, and made oath that the matters and things therein contained, so far as stated upon his own knowledge, are true, and, so far as stated upon knowledge or information derived from others, he believes — to be true.

Given under my hand and seal this 13th day of April, 1886.

[SEAL.]

R. H. EVANS,
Notary Public.

IN THE CLERK'S OFFICE OF THE CIRCUIT
COURT OF ELIZABETH CITY COUNTY, VA.

I hereby certify that the foregoing answer is a true and perfect transcript of one now on file in my said office in said suit.

Given under my hand this 14th February, A. D. 1888.

JNO. BOOKER, *Clerk.*

A copy.

Teste: GEO. K. TAYLOR, *C. C.*

260 And now, at this day, to wit, at a supreme court of appeals held at the State court-house, in the city of Richmond, on Thursday, the 17th of May, 1888.

WILLIAM T. MARROW and MARY E., His Wife; GEORGE B. WEST, and MISSOURI SMITH, Appellants,

against

JOSEPH B. BRINKLEY, JOHN L. PEEK, JOHN B. WHITEHEAD, A. P. Thom, Trustee; William H. Kimberly, Martin McDevitt, Charles T. Groome and Emma D., His Wife; George W. Schermerhorn and George Booker, W. S. Howard, Harry Libbey and George M. Peek, trustees; John S. Tucker, and Richard B. Tunstall, Trustee, Appellees.

Upon an appeal from a decree pronounced by the circuit court of the county of Elizabeth City on the 26th of October, 1886.

261 This day came again the parties, by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said decree. It is therefore decreed and ordered that the same be affirmed, and that the appellants pay to the appellees thirty dollars damages, and also their costs by them about their defence herein expended, which is ordered to be certified to the said circuit court of the county of Elizabeth City.

And afterwards, to wit:

In the Supreme Court of Appeals of Virginia, Monday, June 4th, 1888.

262 On mature consideration of the petition of the appellants to amend the decree pronounced herein on the 17th of May, 1888, it is ordered that said petition be rejected.

Which petition to amend is as follows:

263 *Petition to Amend or for a Rehearing.*

In the Supreme Court of Appeals of Virginia, at Richmond.

MARROW & WIFE *et als. vs.* BRINKLEY *et als.*

To the honorable judges of the supreme court of appeals:

Humbly complaining, showeth unto your honors your petitioners, the appellants, as follows:

1. That on the 17th day of May, 1888, in the above-entitled cause a decree was entered simply affirming the decree of the lower court entered on the 26th day of October, 1886, dismissing the bill of the plaintiffs below, for reasons stated in the opinion of the court.

2. The reasons stated are based upon the equitable doctrine of estoppel *in pais* and innocent purchaser for value, without notice, the language of the opinion on these points being as follows:

(*a.*) "Having kept a sinister silence when they should have spoken with candor and courage, equity now closes her door and leaves them to obtain from a court of law what they can."

(*b.*) "That as against an innocent purchaser for value,
264 without notice, a court of equity is without jurisdiction and will refuse to give any assistance whatever, leaving the party to enforce his technical rights at law."

3. Your petitioners were advised by counsel, when this suit was instituted, that should they obtain the relief prayed for—the annulling of the decrees of May 4th, 1871, and May 4th, 1872, and the deeds to certain purchasers (printed Record, p. 38)—it would still be necessary to bring an action of ejectment against the tenant in possession to recover possession of the lands in controversy.

Acting under this advice, they, about the 1st of October, 1886, within the fifteen years allowed by statute, instituted their second action of ejectment against the tenant in possession in the county of Warwick, the county in which the lands are situated, and this action is still pending.

4. The reasons upon which the decree of the court is founded would lead your petitioners to believe that the decree of affirmance was not intended to prejudge their rights in the suit at law now pending.

Indeed, were it a *consessum* that the effect of the decrees of May 4th, 1871, and 1872, in the consolidated causes and the deeds made to the purchasers, was to vest in them only such title as was vested in Parker West, the judgment debtor, or that the decree of May 4th, 1872, might be attacked collaterally for fraud (22 Gratt., 423–'4), still all the reasons of the opinion might be strictly accurate and correct in a court of equity, or the court may have refused equitable relief while not intending to express any opinion upon the rights of the parties in a court of law.

The practice in such cases is for the court to affirm without prejudice to any suit at law the parties may be advised to bring. (2 Rob. Practice (old ed.), p. 437.)

Your petitioners pray as follows:

That the decree entered in this cause may be amended
265 and corrected so as to read: That the decree of the court below is affirmed, "but this affirmance is to be without prejudice to any suit at law now pending between the appellants and appellees, or that the appellants may be advised to bring for the lands in controversy;" or, should your honors deem it proper that the case should be reheard as to this matter, that this petition may be treated as a petition for a rehearing.

And they will ever pray, &c.

W. P. MARROW AND MARY, HIS WIFE,
GEO. B. WEST, AND
MISSOURI SMITH,
By their counsel, BURROUGHS & BRO.

A true transcript of the record.
Teste: GEO. K. TAYLOR, *C. C.*

Copy Opinion of the Supreme Court of Appeals of Virginia, Delivered on the 17th of May, 1888.

266 MARROW *et als. vs.* BRINKLEY *et als.*

FAUNTLEROY *J.:*

The petition of William P. Marrow and Mary E., his wife; George B. West, and Missouri Smith represents that they are aggrieved by a decree of the circuit court of Elizabeth City county rendered on the 26th day of October, 1886, in a chancery cause in said court pending, in which they, the said petitioners, are complainants and Joseph B. Brinkley, John L. Peek, John B. Whitehead, A. P. Thom, trustee; William H. Kimberly, Martin McDevitt, Charles F. Groome, and Emma D., his wife; George W. Schermerhorn, and George Booker, are defendants. At the August rules, 1870, J. B. Brinkley, a judgment creditor of Parker West, instituted his suit in the circuit court of the county of Elizabeth City to subject the lands of Parker West to the satisfaction of his judgment. At the same rules John L. Peek, another judgment creditor of Parker West, also instituted his suit in the same court to subject the lands of Parker West to the satisfaction of his judgment. At the September term, 1870, of the said court these suits were consolidated with the suit pending in the same court of Willis *v.* Latimer, because the said Latimer was also a cojudgment debtor to the said Brinkley with Parker West. On the 6th of September, 1870, a decree was entered in the said consolidated causes for an account of all the real estate of Parker West, its annual value, and the liens thereon. The commissioners' report, responsive to this order, showing a large number of judgments, aggregating many thousands of dollars, and the lands belonging to Parker West, with their annual and fee-simple value, and their insufficiency to satisfy the judgment liens thereon in five years, was confirmed by a decree pronounced May 4, 1871, and by the same

decree special commissioners were appointed to sell the real estate of Parker West, and, among other lands to be sold, "all the interest of Parker West in that certain tract of land known as 'Newport News,' containing 300 acres," etc. The said Newport News tract of land was in the possession of J. B. Alexander and J. J. Bowen under a sale made by the United States district court of Virginia under the confiscation act of 1864. Parker West died in December, 1871, and at the May term, 1872, of the circuit court of Elizabeth City county, its special commissioners of sale reported that they had sold to sundry purchasers, in designated lots, 64 acres of this
267 Newport News tract for the price of $100 per acre; and on the 4th day of May, 1872, the court entered in the said consolidated causes the following order, viz: "The death of Parker West being suggested, on the motion of William P. Marrow and Mary E., his wife, Elizabeth R. West, George B. West, and M. Smith and Missouri, his wife (the said Mary E. Marrow, Elizabeth R. West, G. B. West, and Missouri Smith being the heirs-at-law of the said Parker West), to be made parties defendant to these causes, the said William P. Marrow and M. E., his wife, E. R. West, G. B. West, and M. Smith and Missouri, his wife, are hereby made parties defendant to these causes, with leave to file their answers. This cause then, this day, again came on to be heard on the papers formerly read and on the report of Special Commissioners C. K. Mallory, Thomas Tabb, and G. M. Peek of the sales made by them under a former decree in these causes, to which report no exceptions have been filed, and were argued by counsel; on consideration whereof the court doth adjudge, order, and decree that the said report of the sales reported therein be, and the same are hereby, confirmed." At the October term, 1872, the said special commissioners of sale reported that they had sold 20½ other acres of the said Newport News tract, at $100 per acre, to John S. Tucker and John B. Whitehead; and, by a decree entered in the said consolidated causes October 2, 1872, the court confirmed the said sale. All the purchase-money for the foregoing-recited sales for the said Newport News tract of land, at $100 per acre, was duly paid and deeds made and delivered to the respective purchasers in obedience to the decrees of the said circuit court. These lands brought the very high price of $100 per acre in the expectation that Newport News would be the deep-water terminus of the Chesapeake & Ohio railroad, but the value of the said lands fluctuated greatly between 1872 and 1881, as the probabilities increased or diminished that Newport News would become the terminus of the Huntington system of railroads. This being definitely determined in 1881, the appellants instituted suit to recover the lands which are the subject of this controversy, and this was the first intimation that the defendants (the appellees here) had that the heirs of Parker West, deceased, made any claim to the lands which had been sold to pay his debts under the decree of the circuit court of May 4, 1872, and which had been bought and paid for by them, although the said heirs (plaintiffs), with the exception of William P. Marrow and Mary E., his wife, who lived in the city of Richmond, resided from 1872 to this time on a part of the very

Newport News tract of land which G. B. West, one of the said heirs and plaintiffs, had purchased at the said sale under the said decree in said causes. This suit, however, was abandoned without bill being filed, and in 1885, after the lapse of more than 13 years from the sale and confirmation of title to these lands, bought and paid for by these *bona fide* purchasers at a judicial sale, and occupied, possessed, and enjoyed and resold to other *bona fide* purchasers, without notice, for value, the said heirs of Parker West instituted an action of ejectment against the appellees to dispossess them of the land which they had purchased. This action also they abandoned, because the court was of opinion that under the decree of May 4, 1872, the defendants were vested with a legal title under a decree which could not be assailed collaterally, and then they brought this suit, seeking to annul the said decree of May 4, 1872, alleging that they were never parties to the causes under which the said lands were sold. The circuit court of Elizabeth City county, by its decree of October 26, 1886, having maturely considered the bill, answers, exhibits, depositions, and argument, dismissed the bill. We are of opinion that the bill was properly dismissed.

In 1870 suits were brought by the creditors of Parker West in the circuit court of Elizabeth City county, having jurisdiction of him and his lands in said county, to subject them to the payment of his debts. Pending the said suits (consolidated) Parker West
268 died, in December, 1871, and his heirs-at-law were made parties defendant to the causes May 4, 1872, by an order of the court reciting that the death of Parker West was suggested, and that his heirs-at-law, the appellants here, were by name, upon their own motion and appearance, made parties defendant and given leave to file their answers. It appears by the very record and the solemn recital of the decree complained of that at the time of the rendition of the decree, May 4, 1872, under which the appellees purchased and to annul which is the object of this suit, they, the appellants, were before the court, and after they had so become parties the sales of the lands were made and reported to the court and confirmed by the court without opposition or question by them or any of them—G. B. West, one of them and one of the appellants, actually purchasing a portion of the lands at the said sales, and some of the others living upon it; and now, after all these years of fluctuation of value, these lands sold at a very high price and applied to pay their ancestor's admitted debts, these appellants seek to set the sales aside, annul the decree of the court, and recover the property, which has since become of great value. The appellees are *bona fide* purchasers from a court of competent jurisdiction, at a judicial sale, for value, without notice of any of the matters extrinsic to the record relied on now by the appellants to support their claim, and as such they have the right to rely absolutely upon the verity of the record as to facts extrinsic to the record and of which they had no notice, even assuming the existence of those facts *dehors* the record. The decisions of the courts, as a system of equity founded upon an enlightened public policy to give sanction to judicial sales and security and repose to judicial titles, establish the rule that a purchaser

at a judicial sale, without notice, under proceedings regular upon the face of the record of a court of competent jurisdiction, will be protected as against the mere errors of the court and secret vices in the proceedings, which can only be made to appear by the proof of extrinsic facts not appearing on the face of the record. To admit a party to a suit the record of which solemnly vouches him to be such, to recover against a purchaser at a judicial sale made under that record, by swearing that no service was actually made on him and that there was no authorized appearance for him, as in this case, many years after the event and after the death of the officers of the court and the distinguished and honorable counsel who had knowledge and could prove the facts vouched in the record of the proceedings, would open the door most invitingly to perjury, injustice, and fraud, destroy all confidence in and efficiency of judicial sales, unsettle titles, and produce untold misery, mischief, and confusion throughout the Commonwealth. The language of this court, by Lewis, P., in Wilcher *v.* Robertson, 78 Va., 616, is: "On the other hand, if it be a judgment or decree of a court of general jurisdiction, and the record declares that notice has been given, such declaration cannot be contradicted by extraneous proof. In such cases the judgment or decree is sustained, not because a judgment rendered without notice is good, but because the law does not permit the introduction of evidence to overthrow that which, for reasons of public policy, it treats as absolute verity. The record is conclusively presumed to speak the truth and can be tried only by inspection. This results from the power of the court to pass upon every question which arises in the cause, including the facts necessary to the exercise of its jurisdiction, and as to which, therefore, its judgment, unless obtained by fraud or collusion, is binding, until reversed, on every other court; and especially is this so in respect to decrees under which sales are made to *bona fide* purchasers. If it were otherwise—if purchasers could be held responsible for the errors of the court, or could be required to look beyond the proceedings in the cause to find authority for the court to act—then such sales, as has well been said, would be but snares for honest men." See, also, 1 Smith Lead. Cas., pt. 2, p. 1127; 2 Amer. Lead. Cas., 803; Reeve *v.* Kennedy, 43 Cal., 647; Freem. Judgm., §§ 416, 509; Dunklin
269 *v.* Wilson, 64 Ala., 163; Hess *v.* Rader, 26 Grat., 749. The appellees are innocent third parties, not concerned in the litigation before the court, and who became purchasers by the invitation of the court, and the evidence of the appearance of the heirs of Parker West is the recital in the court's decree of the fact, solemnly alleged thereby, that these heirs, the appellants, were before the court and admitted as parties defendant on their own motion.

But the evidence in the record, outside of the recital of the fact in the decree itself, is clear and abundant that these heirs knew of the pendency of the suits and all the proceedings therein and the object thereof; that Col. Mallory, who is dead, represented their father in these suits to sell his lands, and they did not revoke or question his authority after the death of Parker West, pending the suits, and before the sales were decreed and made and reported to

and confirmed by the court; nor did they ever take any manner of exception whatever to the act of the court in selling these lands, and the authority of Col. Mallory must be presumed. Judge Moncure, in Wilson *v.* Smith, 22 Grat., 494, says: "He (the attorney) has the right to presume his authority was continued until revoked." And so, whether actual parties or not, they knew of the proceedings and their object, and were in duty bound to act not only with fairness and candor but with diligence, and having failed to do so until, by their omission and laches (if not, indeed, by their cunning and calculating design), the lands have passed, by regular process of law and the proceedings of a court of competent jurisdiction, into the hands of innocent purchasers, without notice, for value, whose possession it would be now inequitable and against public policy to disturb, the appellants are estopped from questioning their title. Grymes *v.* Sanders, 93 U. S., 61; The Key City, 14 Wall., 660; Harwood *v.* Railroad Co., 17 Wall., 81; Hayward *v.* Bank, 96 U. S., 618; Oil Co. *v.* Marbury, 91 U. S., 592; Wendell *v.* Van Rensselaer, 1 Johns., ch. 344; Bank *v.* Morgan, 117 U. S., 108, 6 Sup. Ct. Rep., 657; Morgan *v.* Rai'road Co., 96 U. S., 716; Neslin *v.* Wells, 104 U. S., 438, 439; Dickerson *v.* Colgrove, 100 U. S., 580; Allen *v.* Hoffman, 2 S. E. Rep., 602; Nicholas *v.* Austin, 1 S. E. Rep., 132.

The record shows that these appellants knew all the time all the material facts with reference to the sale of these lands by the circuit court of Elizabeth City county, as far back as 1872, to pay their father's debts. They resided, all but one, upon a part of the very tract which was subdivided and sold to these appellees, which parcel G. B. West, one of the heirs and appellants, had bought in these suits, and the evidence is clear that Marrow, the one residing in Richmond, knew all the proceedings. They had daily evidence before their eyes of the possession by the appellees of the property which they knew had been sold to them. They resided, all of them except Marrow, within a few miles of the residence of the attorney who they knew had been the trusted representative of their father, and who had continued, after his death, to represent them in the suits and the sale of the lands, and they were in daily intercourse with the purchasers who they knew had bought and resold these lands to others for value and without notice. They admit that in 1876 they knew of their supposed rights, yet for nearly 14 years from the sale and purchase of these lands under the decree of the court, in suits for the purpose, to which they were parties, they remain silent and acquiescent. There were periods during all these long years of great doubt and hope deferred as to the final coming of the Chesapeake & Ohio Railroad to Newport News, and of consequent fluctuation and heavy depression in the value of these lands far below the price which these appellees had paid for them, and it was not till after the railroad had reached Newport News that their silence was broken and this suit begun, by which they ask a court of conscience to deprive innocent purchasers of their vested and adjudged rights that they may have the benefit of the ultimate enhancement in the value of these lands of their ancestor, which had been sold 14 years before, under due process of law, to pay

270 his debts, and the proceeds applied with their knowledge, acquiescence, and actual participation to that just and lawful consummation. Having kept a sinister silence when they should have spoken with candor and courage, equity now closes her door and leaves them to obtain from a court of law what they can as a reward for their cunning and calculating caution. All the authorities say that as against an innocent purchaser for value without notice a court of equity is without jurisdiction and will refuse to give any assistance whatever, leaving the party to enforce his technical legal rights at law, albeit any rights he may have. The decree complained of is clearly right, and is affirmed.

271 STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true transcript of the record and proceedings of the cause lately pending in our said supreme court of appeals of Virginia, wherein William P. Marrow and others were appellants and Joseph B. Brinkley and others were appellees.

In testimony whereof I hereto set my hand and annex the seal of said court this 4th day of October, 1888.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

GEO. K. TAYLOR,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

272 *Petition for a Writ of Error to the Supreme Court of Appeals of Virginia, at Richmond.*

In the Supreme Court of the United States.

WILLIAM P. MARROW and MARY, His Wife; GEO. B. WEST, and MISSOURI SMITH, Plaintiffs,

vs.

JOSEPH B. BRINKLEY, JNO. L. PEEK, and Others, Defendants.

To the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States:

And now come William P. Marrow and Mary, his wife, George B. West, and Missouri Smith, by Burroughs and Brother, their attorneys, and complain that in the record and proceedings and also in the rendition of a judgment and decree in a suit between William P. Marrow and Mary E., his wife, Geo. B. West, and Missouri Smith, plaintiffs, and Joseph B. Brinkley, Jno. L. Peek, Jno. B. Whitehead, A. P. Thom, trustee; R. B. Tunstall, trustee; Jno. S. Tucker, Martin McDevitt, Charles F. Groome and Emma D., his wife; George Schermerhorn, George Booker, and William H. Kimberly, in the supreme court of appeals of Virginia, being the highest court of law or equity of the said State in which a decision could be had in said suit, and in which

a final judgment was rendered against them on the 17th day of May, 1888, in said suit, wherein was drawn in question a right, title, privilege, and immunity to real estate arising upon the construction of the act of the Congress of the United States approved July 17th, 1862, entitled "An act to suppress insurrection, to punish
273 treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," and the joint resolution passed concurrently therewith, and the decision is against the right, title, privilege, and immunity claimed under the said statute, all which appears in the record and proceedings in said suit, manifest error hath happened, to the great damage of said William P. Marrow and Mary, his wife; Geo. B. West, and Missouri Smith.

Wherefore they pray for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

BURROUGHS & BROTHER,
Attorneys for Marrow and Wife and Others.

Allowed—bond for costs $250—this August 24, 1888.
JOHN M. HARLAN,
Associate Justice Sup. C't U. S., Assigned to 4th Circuit.

274 [Endorsed:] Wm. P. Marrow and Mary, his wife, & others *vs.* Joseph B. Brinkley & others. Supreme Court of the United States. In error to the supreme court of appeals of Virginia.

275 Supreme Court of the United States.

WILLIAM P. MARROW and MARY E., His Wife, *et als.*, Plaintiffs,
vs.
JOSEPH P. BRINKLEY, JNO. L. PEEK, *et als.*, Defendants.

Know all men by these presents that we, George B. West, principal, of the county of Warwick, in the State of Virginia, and William A. S. Taylor, surety, of the county and city of Norfolk, in the State of Virginia, are held and firmly bound unto Joseph B. Brinkley, of the city of Baltimore, Maryland; John L. Peek, of the county of Botetourt, Virginia; John B. Whitehead, of the city of Norfolk, Virginia; A. P. Thom, trustee, of the same city and State; R. B. Tunstall, trustee, of the same city and State; Jno. S. Tucker, of the city of Washington, District of Columbia; Martin McDevitt, of —— county, State of New York; Charles F. Groome and Emma D., his wife, of the county of Warwick, in the State of Virginia; George Schermerhorn, of the county of Elizabeth City, in the State of Virginia, and George Booker and William H. Kimberley, of the same county and State, in the sum of two hundred and fifty dollars, to be paid to
276 the said Joseph B. Brinkley, Jno. L. Peek, John B. Whitehead, A. P. Thom, trustee; R. B. Tunstall, trustee; John S. Tucker, Martin McDevitt, Charles F. Groome and Emma D., his wife; George W. Schermerhorn, George Booker, and William H.

Kimberley, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

Dated this 22d day of August, eighteen hundred and eighty-eight.

Whereas the above-bound George B. West and others have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled cause by the supreme court of appeals of Virginia, at Richmond, Virginia, affirming the decree of the circuit court of Elizabeth City county, Virginia, rendered in said cause:

Now, therefore, the condition of this obligation is such that if the above-bound George B. West and others shall prosecute the said writ of error to effect and answer all costs if they fail to make
277 good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

GEO. B. WEST. [SEAL.]
W. A. S. TAYLOR. [SEAL.]

Sealed and delivered in the presence of—
L. HARMANSON.

UNITED STATES OF AMERICA, }
Eastern District of Virginia, } *ss:*

Wm. A. S. Taylor, being duly sworn, deposes and says that he is worth the sum of two hundred and fifty dollars over and above all his just debts and liabilities and all exemptions allowed him by law.

Sworn to before me this 22d day of August, 1888.

[SEAL.] L. HARMANSON,
U. S. Commissioner for the Eastern District of Virginia.

This bond is approved this August 24th, 1888.

JOHN M. HARLAN,
Asso. Justice S. C. U. S.

278 VIRGINIA:

IN THE CLERK'S OFFICE OF THE SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND, *October 4th*, 1888.

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true copy, the original of which is on file in my office.

Given under my hand.

GEO. K. TAYLOR,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

279 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of appeals of the State of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between William P. Marrow and Mary Marrow, his wife; George B. West and Missouri Smith, appellants, and Joseph B. Brinkley, John L. Peek, John B. Whitehead, A. P. Thom, trustee; R. B. Tunstall, trustee; John S. Tucker, Martin McDevitt, Charles F. Groome and Emma D. Groome, his wife; George Schermerhorn, George Booker, and William H. Kimberly, appellees, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause
280 of the Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, senior associate justice of the said Supreme Court, the twenty-fourth day of August, in the year of our Lord one thousand eight hundred and eighty-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Justice Sup. C't U. S., Ass'd to 4th Circuit.

281 [Endorsed:] Marrow & wife *vs.* Brinkley & others. Citation.

VIRGINIA:

IN THE CLERK'S OFFICE OF THE SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND, *October 4th*, 1888.

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that a copy of the within writ is on file in my office.

Given under my hand.

GEO. K. TAYLOR,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

282 The United States of America to Joseph B. Brinkley, John L. Peek, John B. Whitehead, A. P. Thom, trustee; R. B. Tunstall, trustee; John S. Tucker, Martin McDevitt, Charles F. Groome and Emma D. Groome, his wife; George Schermerhorn, George Booker, and William H. Kimberly, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the State of Virginia, wherein William P. Marrow and Mary Marrow, his wife; George B. West, and Missouri Smith are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the decree rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 24th day of August, in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN M. HARLAN,
Justice Sup. C't U. S., Ass'd to 4th Circuit.

283 [Endorsed:] (Original.) Service of the within acknowledged this 27th day of August, 1888. Alfred P. Thom, trustee. Rich'd B. Tunstall, trustee. Walke & Old, att'ys for John S. Tucker. C. F. Groome. E. D. Groome. Wm. H. Kimberly. Geo. Schermerhorn. Geo. Booker. John L. Peek, per G. M. Peek, att'y. Joseph B. Brinkley, by Thomas Tabb, att'y.

On this 24th day of September, in the year of our Lord one thousand eight hundred and eighty-eight, personally appeared Frank R. Henry, dep'y serg't, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to John B. Whitehead.

FRANK R. HENRY,
Deputy Sergeant.

Sworn to and subscribed the 24th day of September, A. D. 1888.

[Seal U. S. District Court, Eastern Dist. of Virginia.]

A. R. HANCKEL,
Deputy Clerk U. S. District Court, E. D. of Va.

IN THE CLERK'S OFFICE OF THE
SUPREME COURT OF APPEALS OF VIRGINIA,
AT RICHMOND, *October 4th*, 1888.

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that a copy of the within citation is on file in my office.

Given under my hand.

GEO. K. TAYLOR, *Clerk.*

Endorsed on cover: Virginia sup. court of appeals. No. 1262. William P. Marrow and Mary Marrow, his wife; George B. West, and Missouri Smith, plaintiffs in error, *vs.* Joseph B. Brinkley, John L. Peek, John B. Whitehead, *et al.* Filed October 10, 1888.

Supreme Court of the United States.

OCTOBER TERM, 1888.

NO. 1,262.

WM. P. MARROW AND WIFE AND OTHERS

versus

JOSEPH B. BRINKLEY AND OTHERS.

ON THE MOTION TO DISMISS.

Brief of Plaintiffs in Error, in Opposition to the Motion.

BURROUGHS & BRO.,
Of Counsel for Plaintiffs in Error.

NORFOLK, VA.:
LANDMARK STEAM PRESSES, 83 MAIN STREET.

Supreme Court of the United States.

OCTOBER TERM, 1888.

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WM. P. MARROW AND WIFE AND OTHERS

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ON THE MOTION TO DISMISS.

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NORFOLK, VA.:
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.—No. 1,262.

WM. P. MARROW AND WIFE AND OTHERS

versus

JOSEPH B. BRINKLEY AND OTHERS.

ON THE MOTION TO DISMISS.

BRIEF OF PLAINTIFF IN ERROR, IN OPPOSITION TO THE MOTION.

I.

The motion to dismiss is not accompanied with a motion to affirm under Rule 5.

The sole proposition for discussion then is: Is there a Federal question involved such as to give this Court jurisdiction to re-examine the decision of the Court of Appeals of Virginia under §709 of the Revised Statutes?

The argument of the defendants in error is briefly this:

The bill of the plaintiffs in error filed in 1886, was to annul certain decrees in the consolidated causes of Brinkley vs. Latimer and others filed in 1870; the object of the consoli-

dated causes of Brinkley vs. Latimer and others, was to subject the lands of Parker West to certain judgment liens, one of them obtained in 1861, prior to the confiscation of the "Newport News" land of Parker West in June, 1864.

That by a decree entered in the consolidated causes of Brinkley vs. Latimer and others, May 4th, 1872, the plaintiffs in error, the heirs of Parker West were made parties defendant to the said causes.

That the principal portion of the land in controversy, a portion of the "Newport News" confiscated land, was purchased by John B. Whitehead and John S. Tucker, *after the decree of May 4th*, 1872, and the sale confirmed October, 1872.

After this statement of the case, on page 6, they say:

"We deny that there was any decision in this cause in regard to the effect of the confiscation act or the resolution concurrent therewith. It was not necessary for the purposes of the case, and none such was rendered. *That question was involved in the consolidated causes brought in* 1870, *but was not involved in this cause.* The question involved in this cause was whether the plaintiffs in error were made parties to the consolidated causes under the decree of May 4th, 1872; whether that decree was conclusive upon them as to that point; and whether, even if not conclusive, their laches had not been such as to estop them from any relief against purchasers for value in those suits, and whether purchasers for value were not entitled to be protected against the claims set up by them."

After thus denying that the decree of the Court of Appeals involved a decision of the right and title claimed under the Confiscation Act, July 17th, 1862, and stating the other questions, which were involved and decreed upon principles of general law not affecting the act of Congress; they proceed to show by extracts from the Bill and answers, and from the

opinion of the Court, that no Federal question was involved and none decided, but that the case was decided on other grounds.

II.

We claim that a Federal question was raised, and that it was decided against the right claimed.

(a) The final judgment rendered 17th May, 1888, by the Court of Appeals, the highest Court of the State, involved the construction of the Act of Congress, July 17th, 1862, and the joint resolution passed concurrently therewith.

The question of the right and title to real estate under the said act was raised by the pleadings in the cause *ipsisimis verbis.*

The decision of this question was necessary; the final judgment as rendered could not have been rendered without considering it; and the decision was against the right claimed. And, that the evasion of, or the failure to allude to the Federal question, in the opinion of the Court, does not affect the jurisdiction of this Court.

(b) In rendering the said final judgment, the Court so construed the Statute of Virginia, Code 1873, ch. 182, § 9, as to enforcing judgment liens on real estate, and the Statute, Code 1873, ch. 169, § 4, as to *Scire Facias,* to revive a suit against the heirs of a decedent, that the plaintiffs in error were deprived of their property "without due process of law," contrary to the provisions of the 14th Amendment to the Constitution of the United States.

III.

The rulings of the Court upon the essentials to give jurisdiction.

We are not disposed to critiscise the cases cited by the defendants in error on this subject, the general propositions asserted in them are conceded. They are:

1st. That it must appear affirmatively, that a Federal question was presented for decision to the highest court of the State.

2nd. That its decision was necessary to the determination of the cause.

3rd. That it was actually decided; or *that the judgment as rendered could not have been given without deciding it.*

4th. That the decision was against the right or title claimed under the Federal law.

And we further concede, that when there are presented for decision both questions of Federal law, and questions of general law; if the questions of general law dispose of the case, and can be decided without reaching the Federal question, or in the words of Waite C. J., in Chouteau vs. Gibson, 111 U. S., 201, when "The Federal questions, *lay behind* this defence, (the general question) and could not be reached until it was out of the way," then this Court has not jurisdiction.

But if the converse is true, and the Federal question lies at the threshold of the enquiry, and the questions of general law decided, *lay behind* the Federal question, then this Court has jurisdiction.

We call the attention of the Court to the rulings in a number of cases not cited by the defendants in error, bearing more particularly upon the facts of the case at bar.

River Bridge Co. vs. Kansas Pac. Ry Co., 92 U. S., 315.

In this case Miller J. says, "In chancery cases, or in any other class of cases where all the evidence becomes part of the record in the highest court of the State, the same record being brought here, this Court can review the decision of that Court on both the law and the fact, so far as may be necessary to determine the validity of the right set up under the Act of Congress."

The case at bar being a chancery case, the whole record is before the Court, in determining this motion, and not merely the opinion of the Court of Appeals of Virginia from which such liberal extracts have been made in the brief of the defendants in error.

(a) *Where the Federal question was raised in the State Court but not passed upon either in the judgment, or the opinion of the Court.*

Chicago Life Ins. Co. vs. Needles, 113 U. S., 575.

In this case the Corporation was chartered in 1865, subsequently, in 1869, by a general law, provision was made for winding up insolvent corporations, under certain circumstances, and a mode of proceedure pointed out, whereby the Corporation could be brought before the Courts and judicially dissolved.

Steps were taken in accordance with this act to forfeit the charter of the Chicago Life Insurance Co.; the defence was made that the act of the Legislature under which the proceedings were taken was in violation of the Constitution of the United States, impairing the obligation of the contract between the State and the Corporation.

In the Supreme Court of Illinois, the same question was

raised in the assignment of error; that Court merely affirmed the decree of the lower Court.

Harlan J. "The Supreme Court of Illinois did not in terms pass upon the claim distinctly made there, as in the Court of original jurisdiction, that the statutes in question were in derogation of the rights and privileges secured to the appellant by the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for if the statutes upon the authority of which alone the Auditor of the State proceeded are repugnant to the National Constitution, that judgment could not properly have been rendered.

"This Court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States has been withheld or denied by the judgment below. And our jurisdiction is not defeated, because it may appear upon examination of this Federal question that the Statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction."

Des Moines Nav. Co. vs. Iowa Homestead Co., 123, U. S., 552.

The object of the suit in the lower Court in the State was to recover certain taxes paid on lands held by the Navigation Company.

The defence was that this question had been decided adversely to the Homestead Company in the suit of the Homestead Co. vs. Valley Railroad, 17 Wall., 153. The decision was against the Navigation Company, on appeal to the Supreme Court of Iowa, the Court held that the question as to the former decision of the Court in 17 Wall. was not raised in

the briefs of counsel, they refused to pass upon it and affirmed the decision of the lower Court.

Waite C. J. "We cannot look upon the reason given by the Court below for not considering the question of prior adjudication as sufficient for avoiding the decision of a controlling Federal question, fairly presented by the pleadings, proofs and assignment of errors, and necessarily involved in the determination of the case. That question stood in the very front of the litigation, and if decided in favor of the Navigation and Railroad Company, ended the whole matter. To give judgment the other way, without considering it, was simply to ignore one of the most important elements of the case as it stood in the record. There can be no escape from this conclusion." p. 555.

The same principle is distinctly stated in a case cited by the defendants in error (Chapman vs. Goodnow, 123 U. S., 540) where the Court thought the decision of the Federal question unnecessary.

Waite C. J. "If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim *but avoids all reference to it* is as much against the right, within the meaning of Sec. 709 of Revised Statutes as if it had been specifically referred to and the right directly refused." p. 548.

(b) *Where the Federal question is not distinctly raised in the pleadings, if the record shows it did arise and was necessary to be considered in the judgment rendered, this Court has jurisdiction.*

Palmer vs. Hussey, 119 U. S., 96.

Palmer, on 18th April, 1874, obtained judgment in Supreme

Court of New York, against Hussey, for $32,128.57, for certain bonds placed in his hands as agent, and which he had converted to his own use.

Hussey having filed his petition in bankruptcy, received his discharge 17th May, 1880, and on the 12th of June, 1880, moved the Supreme Court to perpetually enjoin the judgment because of his discharge. Palmer, in his affidavit, when resisting the motion, alleged, "that the bonds were received in a fiduciary capacity and were fraudulently disposed of."

The motion was denied, on appeal the Court of Appeals reversed the decision of the Supreme Court on the ground that the fraud alleged was not of the character contemplated by § 5117 of Revised Statutes.

Hussey sued out writ of error to this Court, and on motion to dismiss, the court held it had jurisdiction.

The Federal question here was shown alone by the affidavits filed on a motion to enjoin a judgment. It was not raised by the pleadings, in the technical sense.

Furman vs. Nichol, 8 Wall, 44.

In this case, Furman tendered to the Clerk of the County Court certain notes of The Bank of Tenesse in payment of taxes due the State of Tennessee; the Clerk refused to receive them. He then applied to a Circuit Court by petition for a mandamus to compel him to receive them, claiming that the State, in granting the charter of the bank, had agreed to receive the notes of the bank in payment of taxes. The mandamus was granted, but on appeal the Supreme Court of the State reversed the decision without assigning any reasons for the decision.

Davis J. "If the record shows either by express averment, or by clear and necessary intendment, that the constitutional

provision did arise, and that the Court below could not have reached the conclusion and judgment it did reach without applying it to the case in hand, then the jurisdiction of this Court attaches." p. 56, ——— and also, ———

"It is insisted that the petition should have averred that the State had impaired, or by some act attempted to impair, the obligation of a contract; but this does sufficiently appear by necessary intendment, for it is alleged that Furman was the owner of the notes and entitled to have them received for taxes by virtue of a contract with the State; that he had tendered them to the defendant, who refused to receive them, and that it was not in the power of the Legislature to impair the validity of the contract." p. 57.

Here the Federal question was not stated in terms either in any of the pleadings or in the opinion of the Court, *it was inferred* from facts stated in the petition.

Aldrich vs. Ætna Compamy, 8 Wall., 491.

Aldrich sold a vessel to Jacobs, at Chicago, and the same day took a mortgage to secure the purchase money, which was duly recorded in the Office of the Collector at the Port of Chicago. It was not recorded under the Statute of Illinois requiring mortgages of personal property to be recorded. Jacobs, the purchaser, took possession of the vessel immediately, and subsequently the vessel was attached in Buffalo, New York, for a debt due by him to the Ætna Company.

Under the provisions of the Code of New York, upon an agreed state of facts, the question of the priority of the lien of the mortgage and the attachment were submitted to the Superior Court of Buffalo—with the Ætna Company as plaintiff. The Court decided that the attachment was the prior

lien; on appeal, the highest Court of the State affirmed this decision.

Nelson J. "It is also objected that it does not appear on the face of the record the validity of a statute or law of the United States or the statute of a State as repugnant to such law, or that the construction of any statute of the United States was drawn in question."

"This we think a clear misapprehension of the material questions involved in the case. The question was whether the mortgage of the vessel to the defendants, duly recorded under an Act of Congress in the Collector's Office gave a better lien upon it than the subsequent attachment issued out of the Superior Court of Buffalo in favor of the plaintiff. The construction of this Act of Congress and its force and effect, as it respected the mortgage security under which the defendants claimed a right or title paramount to that of the attachment creditor, was necessarily in question and must have been passed upon by the Court, and as its decision was against this right, the very case is made provided for in this section." p. 495.

Murdock vs. City of Memphis, 20 Wall., 590.

In July, 1844, Congress having authorized a naval depot at Memphis, the ancestors of Murdock conveyed a tract of land near the city "for the location of the naval depot," and in the same deed (a quadrupartite one) both the grantors and the city conveyed the same land to one Wheatley, in fee, in trust for the grantors and their heirs, "in case the same shall not be appropriated by the United States for that purpose."

In September, 1844, the city of Memphis conveyed the land by deed, with covenants of general warranty, to the United States, without condition or limitation. The United States took possession of the land, erected buildings and made im-

provements, but in August, 1854, by Act of Congress, transferred the land back to the city. Terms of the act were: "Ceded to the Mayor and Aldermen of the city of Memphis *for the use and benefit of said city.*"

Murdock filed his bill claiming that upon the failure to use the land for the purposes designated it was held in trust for the grantors, and sought to subject it to the trusts.

There was a demurrer to the bill, which was sustained, and on appeal to the highest Court of the State, the decision was affirmed.

Held. That there was a Federal question involved. p. 601.

This case on this point was affirmed in Citizens Bank vs. Board of Liquation, 98 U. S., p. 142.

Waite C. J. "In that case the decision of the Federal question raised was necessary. The judgment as given could not have been rendered without passing upon it."

The Federal question was not raised in 20 Wall., *supra*, directly by the pleadings, or referred to in the judgment of the Court or in its opinion.

In this respect this decision merely followed the earlier cases on the subject, see Crowell vs. Randall, 10 Peters, 368, where Story J. uses this language: "And the Court were of opinion that the act (Act of Congress) could not be evaded by the omission to refer to it in the judgment, or to spread it on the record." p. 395.

(c) *Where the Federal question is not raised by the pleadings, and there is no direct reference to the Federal law in the record, if it appear that such a question was decided adversely to the Federal right, this Court has jurisdiction.*

Murray vs. City of Charleston, 96 U. S., 432.

The city had power to levy taxes. By its ordinance personal

property was assessed at two cents on the $1.00; the third section of this ordinance provided that the treasurer of the city should collect the tax on city stock by retaining the tax out of the interest payable to the holder of the stock.

Murray was the holder of $35,263.33 of the city stock; he was not a resident of Charleston, but a resident of Bonn, Germany.

The tax was retained out of the interest due him, and Murray brought suit in the Court of Common Pleas against the city to recover the illegal tax.

This Court decided (1) That the city had the right to tax the stock; (2) That it had the right to collect the tax by retaining it out of the payment of interest due thereon.

On appeal to the Supreme Court of the State, one of the grounds assigned as error was that the levying and retaining of this tax was in violation of the good faith of the contract of loan, and impairs the obligation of the contract.

The Supreme Court affirmed the decision below, holding (1) That the stock was liable to taxation by the city; (2) That the right of taxation existed at the time the contract of loan was made and formed a part of it, and it did not impair the obligation of the contract.

Strong J. "The jurisdiction of this Court over the judgment of the highest Courts of the States is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution." * * * * *

"The form and mode in which the Federal question is raised in the State Court is of minor importance, if, in fact, it was raised and decided." * * * * *

"In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the State Court expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a Federal question was presented, but

whether such a question was decided, and decided adversely to the Federal right. Everywhere in our decisions it has been held that we may review the judgment of a State Court when the determination or judgment of that Court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the Federal question was formally raised." p. 441-2.

(d) *Although it does not appear affirmatively on the record that the Federal question was raised in the State Court, if it may be reasonably inferred that the Federal question raised here was necessary to the decision there, this Court has jurisdiction.*

Eureka Lake Co. vs. Yuba County, 116 U. S., 410.

This was a suit against a foreign corporation; an injunction was issued and violated by the corporation; an order was made to show cause why it should not be fined for contempt; the agent designated under the Statute to accept service of process for the corporation resigned pending the proceedings; the new agent, appointed in his place, kept out of the way of the sheriff and evaded service of the process.

The Court, under the Code authorizing a Court where the course of proceedings is not specifically pointed out, "to adopt suitable process or mode of proceeding, conformable to the spirit of the Code," to enforce its jurisdiction, directed the order to show cause to be served on the attorneys of record of the corporation. The service was effected; the corporation was adjudged guilty of contempt and to pay a fine of $250 to the State of California.

The point was made for the *first time in this Court* that such service was not "due process of law" within the meaning of

the Constitution of the United States, and that the judgment violated the 14th Amendment.

Waite C. J. "It does not appear affirmatively on the face of the record that the orders of the Superior Court were objected to in the Supreme Court on the ground that in the absence of personal service of the order to show cause on some officer or authorized agent of the corporation, the judgment in the contempt proceeding was without due process of law, and therefore contrary to the 14th Amendment of the Constitution of the United States: yet that point *is made here*, and *it is possible its decision* was necessarily involved in the final order that was made. For this reason the motion to dismiss is overruled." p. 415–16.

Arrowsmith vs. Harmoning, 118 U. S., 194.

This suit was to recover land, and the validity of the judgment depended on the validity of a sale made of the land by the guardian of Arrowsmith under the orders of a Probate Court.

In the Probate Court the case was tried without a jury, and the findings of fact show that the proceedings were all regular —except that the Court dispensed with the giving of a bond by the guardian to account for the moneys arising from the sale, as required by statute.

Arrowsmith claimed that the sale was void; the Court of Common Pleas decided that it was not, and gave judgment accordingly; on appeal to the District Court the judgment was affirmed, and subsequently it was affirmed by the Supreme Court of Ohio.

Among the errors assigned in the petition to the latter Court was that the plaintiff in error was deprived of his right of trial by jury, and also deprived of his property without due

process of law contrary to the provisions of the Constitution of the United States.

Waite C. J., speaking of this assignment of error says: "This is the first time, so far as the record discloses, that even the semblance of a Federal right was set up in the case, and even here it is not easy to see on what ground it could be claimed that Arrowsmith had been deprived of his property in violation of the Constitution of the United States. It was for this reason, perhaps, that the Supreme Court, while affirming the judgment of the District Court, took no notice of this assignment of error in its opinion. The decision, however, necessarily involved a denial of the right which was claimed in this way, and thus we probably have technical jurisdiction. For this reason the motion to dismiss must be denied." p. 195.

(e) *Rulings as to Jurisdiction in cases under the Confiscation Act of July 17th, 1862, where the case was decided against the right claimed, on questions of general law.*

Avegno vs. Schmidt, 113 U. S., 293.
Sheilds vs. Schiff, 124 U. S., 351.

The first of the cases was submitted to the Court on the motion to dismiss and the merits at the same time.

In the second case, a motion to dismiss or affirm was submitted to the Court on the 2nd of March, 1885, and on the 9th of March, 1885, the motion to affirm was denied, and the motion to dismiss postponed to the merits.

In each of these cases the question was substantially the same—land was mortgaged; subsequently it was confiscated; after confiscation the mortgagee proceeded to have the mortgage foreclosed, making only the mortgagor a party defendant, the land was sold under these proceedings.

After the death of the mortgagor his heirs bring suit for the land against the purchaser, claiming that the foreclosure was void because they were not made parties.

Their contention was based upon the well recognized principle that the alienee of mortgaged land is a necessary party to a foreclosure sale, he has the right to redeem.

And the further claim that the effect of confiscation was to vest at once in the purchaser at the confiscation sale, an estate in the land for the life of the offender, with a reversion in his heirs presumptive, subject to the mortgage debt.

The defence made to this claim was that the mortgage was of that peculiar kind known to the laws of Louisiana, containing the pact *de non alienando*. The effect of which is to secure to the mortgage creditor the right to foreclose his mortgage by executory process directed *solely against the original debtor*, and to seize and sell the mortgaged property, *regardless of any subsequent alienations*.

In each of these cases it was held that the pact *de non alienando* was a sufficient defence to the contention that the heirs presumptive of the offender were necessary *parties at the time the decree of Sale was made* in the foreclosure proceedings.

Yet, in each of them, the Court took jurisdiction in order to examine into the claim set up under the provisions of the confiscation act, July 17th, 1862, which the State Court had decided adversely to the heirs.

On the motion to dismiss, the question was not did the State Court decide properly, that arises on the merits, but was there a right claimed under the Act of Congress, which it was necessary to decide, which had been decided adversely to the right claimed.

IV.

The history of the case in its bearings on the Federal question.

The plaintiffs in error, the heirs of Parker West, brought ejectment against C. F. Grome and Emma his wife for five acres of land, W. H. Kimberly for three acres of land, Martin McDevitt a half acre of land, and John B. Whitehead for twenty and a half acres of land, part of the Newport News tract, formerly owned by Parker West.

These defendants claimed title to the land under deeds to them from Special Commissioner Peek in 1879 and 1880, in pursuance of decrees in the consolidated causes of—

(1)	(2)	(3)
BRINKLEY, &c.	WILLIS	PEEK
vs.	vs.	vs.
LATIMER, &c.	LATIMER.	WEST.

The contention of the plaintiff was that the land in controversy was confiscated land, that neither the purchaser at the confiscation sale nor the plaintiffs (the heirs presumptive of the offender) were parties to the suit, and therefore the decree of sale—*May 4th*, 1871—under which these parties claimed, was void.

The defendants replied admitting that to be true, it appears by the recitals of the decree of May 4th, 1872, when the sales were confirmed, after the death of the offender, that you were then parties to these causes.

The plaintiffs contended, first, that a void decree could not have validity given to it by confirmation of the sale made under it; second, that they did not appear in person and ask to be made parties to the said causes, that they had no knowledge of it whatever, and that they did not authorize any one to appear

for them, and asked the Court to exclude from the jury the deeds offered in evidence; the Court being of opinion that the decrees could not be attacked collaterally, refused to admit the evidence offered attacking the decrees, and the plaintiffs took a non-suit.

The plaintiffs the same day instituted this suit in equity against the parties to the consolidated causes, No. 1 and No. 3, and the purchasers, under the said decree making a *direct attack* upon the decree of May 4, 1871 as void, and the decree of May 4, 1872, as obtained by fraud, and asking the Court to annul the said decrees and the deeds to the purchasers; wherein it is alleged:

That Parker West owned nine tracts of land in the counties of Elizabeth City and Warwick; that one of these tracts—the "Newport News" tract—was on the 3rd of June, 1864, confiscated, and sold by the Marshal, and a deed made to the purchasers at the confiscation sale, 13th February, 1865.

That Joseph B. Brinkley, the plaintiff in the consolidated cause No. 1, obtained a judgment against Parker West in 1861; that John L. Peek, the plaintiff in consolidated cause No. 3, obtained a judgment against Parker West, in March, 1867, after the decree of confiscation; and all the other creditors in said causes obtained their judgments after the decree of confiscation.

The object of these consolidated causes was to enforce the judgment liens of the creditors of Parker West against his lands, under the provisions of Code of 1873, ch. 182, sec. 9 and 10, which allows the lienors to sell the lands of the judgment debtor, when it appears that the rents and profits will not discharge the lien in five years, but requires that as between the judgment debtor and alienees of his lands, that the real estate retained by the judgment debtor shall be first liable.

That in these suits the parties defendant were Parker West and Geo. B. West, the latter was a party as trustee in a deed from Parker West, executed in 1867, after the confiscation decree, conveying the "Newport News tract" in trust for the payment of certain creditors. That Parker West (in the language of this Court, in Wallach vs. Van Riswick, 92, U. S., p. 268), had "in him no estate or interest of any description which he could convey by deed and no power which he could exercise in favor of another," in the "Newport News" tract after the decree of confiscation; and that Geo. B. West as trustee in said deed could derive none from him.

That J. B. Alexander and J. J. Bowen, the purchasers at the confiscation sale, and the heirs presumptive of Parker West (the plaintiffs in error) owned the fee in the Newport News tract, the purchasers owning an estate for the life of the offender, and the heirs the reversion after the life-estate, subject to the judgment lien of Brinkley; that these persons were not served with process in said suits; that the bills contained no allegations as to them or their interest in said tract of land, and no relief was asked as to them or their interests in said land.

That the decree of sale in these suits, entered May 4th, 1871, which directed the sale of the lands of Parker West, unconfiscated, and the sale of "*all the interest of Parker West in the Newport News tract,*" was so far as it was claimed to effect their interests therein void, it was simply anullity.

That the decree of May 4th, 1872, confirming the sales made in the lifetime of Parker West (who died December, 1871) and reciting that the heirs of Parker West appeared and on their motion were made parties defendant, was entered without their knowledge or consent, that they did not so appear and ask to be made parties, that no one had authority to appear for them

in said suits and the decree was a fraud upon their rights, and void; and that it could not give validity to the decree of May 4th, 1871.

That prior to the commencement of the action of ejectment, they had tendered to the purchasers of the said tracts of land the amount of the purchase money paid by them and interest, and they continued the tender in the bill. And that there was a sum of money on deposit in bank to the credit of the consolidated causes, which they had refused to receive, more than sufficient to pay the purchasers their purchase money and interest. This sum being the proceeds of the sales of lands in said suits.

The defendants claimed that the decree of sale, May 4th, 1871, was valid, and that the Court had power to enter such decree. If this were not true, that the sales were confirmed by the decree of confirmation, May 4th, 1872, when the heirs were parties, and this cured the defect, if there were any.

That the defendants being purchasers for value, the heirs could not contradict the recitals of this decree by matters extrinsic the record, that they had been informed that C. K. Mallory, an attorney, appeared for the heirs at the time the said decree was entered. And that the heirs were estopped by their conduct and laches.

And it appears from the record that an action of ejectment is now pending for the lands in controversy commenced in 1886, awaiting the decision of this suit to annul the decrees and deeds; that the Court of Appeals of Virginia, upon a petition presented for that purpose, refused to modify their decree affirming the decree of the Court below dismissing the bill, by adding that it was "without prejudice to any suit at law now pending."

We call special attention to some of the differences between

this history of the case, and that made by the defendants in error. (pp. 1-5 brief.)

One would suppose from their statement that the judgments which were sought to be enforced, were all prior to the decree of confiscation in 1864, whereas there was out of the large number but one, the judgment of Brinkley, in 1861, and mentioned by them of course.

The only purchasers mentioned are Whitehead and Tucker, who bought after May 4th, 1872; nothing is said about the purchase of Groome, McDevitt and Kimberly before the death of Parker West.

And the purchase of Whitehead is mentioned as if it was made under the decree of May 4th, 1872. There was but *one decree of sale* of the Newport News tract, that decree *was made May 4th*, 1871, at a time when it clearly appears the heirs were not before the Court.

All of the defendants purchased under this decree of May 4th, 1871, *a decree void* for want of jurisdiction over the parties in whom *the fee of the land was vested; there was no other decree of sale.*

V.

The Federal question distinctly raised in the pleadings.

The first paragraph of the bill sets out in full the confiscation proceedings under the Act of Congress, July 17th, 1862. (pp. 23-4 of Record.) And in the fifth paragraph this language is used:

"The plaintiffs allege that at the time the suits of Brinkley vs. Latimer & West, and Peek vs. West were begun, and at the date of said decree of sale, all the right, title and interest of

Parker West in the said tract of land known as "Newport News," had been divested by the confiscation proceedings mentioned in the first paragraph in this bill, and that he had no estate whatever in said lands; that J. B. Alexander and J. J. Bowen, the purchasers of the said tract of land at the confiscation sale, and the plaintiff and Lizzie B. West, the children of Parker West, were the only persons who had any estate in said lands; that the said Circuit Court of Elizabeth City County had no power or jurisdiction to decree a sale of said tract of land and vest in the purchaser a fee simple title unless they were parties to the said suit; that these persons, essential parties, were not only not served with process in said suit, but the plaintiffs did not even ask in their bills that they should be made parties. They charge that the said decree of *May 4th*, 1871, is absolutely null and void for want of jurisdiction over the persons of the only parties who had any estate in the said lands, or any interest therein; and they claim that the said decree being *a nulity, no act done in pursuance of said decree is valid;* that the sales made under it and the deeds made to the purchasers hereinafter named *are void*, and *that no subsequent decree or order made in the said consolidated causes did or could give any validity to said void decree.*" (p. 26 of record.)

The claim of the plaintiffs in error not only appears in the bill as set forth in the above paragraphs, but it is set forth in the assignment of errors in the petition to the Court of Appeals. (pp. 7, 8 of record.)

Upon this claim under the Act of Congress, distinctly set up, the defendants in error took issue directly, as will appear by the following extracts from their answers:

"Fifth. This respondent, further answering, alleges that the construction and effect of *said confiscation proceedings* is a

matter of law and has been determined by the Court in a proceeding *inter* parties and is *res adjudicatæ*, and it is not a matter of fact to which any answer is required, but this respondent pleads that the rights of the creditors of Parker West could in no wise be affected *by the confiscation proceedings*, the purpose and object thereof being to deprive Parker West personally of the enjoyment and use of the confiscated property and could not be and were not intended in any way to affect the rights of his creditors existing prior to such proceedings, and that if this respondent's construction of the effect of said confiscation proceedings above given should be erroneous, that he further pleads that the heirs of Parker West took upon his death as heirs and subject to the rights of his creditors." (p. 55 of record; Ans. of J. B. Whitehead.)

And from the same answer in Par. VI: (p. 56 of record.)

"And this respondent believes that the said heirs of Parker West have lost their rights in the confiscated lands, if since the period referred to they had any, *which this respondent denies.*"

"This respondent does not know when the parties learned of the decision of the Supreme Court of the United States in the case of Wallach vs. Van Reswick, but if as they allege they learned of it in 1876, it appears that they have known even of that decision for a period of nearly ten years before the institution of this suit."

"And this respondent is advised that *the said decision is in no way in conflict with the action of the said Circuit Court of Elizabeth City County*, or with the rulings of the said Court since then upon the same subject."

So, also, in the answer of W. H. Kimberly, issue is taken directly upon the claim of the heirs under the Confiscation Act:

"V. He says that the effect of the said confiscation pro-

ceedings, if they have any bearing whatever in this cause, which your respondent wholly denies, is a matter to be determined by this honorable Court."

"And he further says that the rights of the creditors of said Parker West were in no manner affected by the said proceedings upon his death. Upon the death of said Parker West the said lands *descended to his heirs at law, subject to the rights of his creditors at the time of confiscation precisely as if there had been no confiscation of the same.*"

"He denies that the decree of May 4th, 1871, is absolutely null and void, and that at its date the heirs of Parker West were necessary parties to said suit."

"VI. * * your respondent cannot undertake to say what were the impressions of the said plaintiffs, or as to their knowledge of the legal effect of the confiscation proceedings upon their rights in said property. He does, however, say that at that time the general impression among lawyers whose opinions were worthy of consideration, with but few exceptions, was that confiscated property, upon the death of the ancestor whose estate had been confiscated, *descended to his heirs at law, subject to the rights of his creditors existing at the time of confiscation as if there had never been any confiscation.*'

Here then we have a right and title to land claimed under the Act of Congress and the concurrent resolution July 17th, 1862, and a distinct denial that the confiscation proceedings under the said act, in any way affected the rights of the plaintiffs. It is not possible to have raised a Federal question in a more distinct and emphatic manner.

VI.

Was the Federal question decided; *or could the judgment as rendered have been given without deciding it.*

There is nothing in the terms of the judgment or the opinion of the Court on the subject, the Federal question was simply ignored.

In the opinion, the Federal question raised is treated just as the defendants in error claimed it should be, *as if there had been no confiscation proceedings*, and the rights of the plaintiffs in error, under act of July 17th, 1862, are denied by ignoring them.

But while the Federal question was not decided, *its decision was necessary to the judgment rendered.*

It is true there were other questions in the case; the effect of the recitals in the decree of May 4th, 1872, purchaser for value without notice, estoppel and laches, and these questions were decided against us, and the opinion of the Court discusses these non-Federal questions.

(a) We claim, however, that these questions could not be reached without passing the Federal question. In the opinion and in the brief of defendants in error, the argument proceeds as if the decree of May 4th, 1872, was *the decree of sale*, and the purchases were made under it, at a time when the heirs were parties to the suit, they both ignore the most prominent fact in this litigation, that *the only decree of sale was May 4th*, 1871, when confessedly the heirs were not before the Court, and the Court had no jurisdiction over them, nor was there any person before the Court as defendant who had any estate in the lands sold. They close their eyes to the fact that the

claim is distincly made that this *decree of sale* under which the purchasers bought is alleged to be void, and that it could not be cured by any subsequent proceeding in the suits. A claim based solely on the rights arising under an Act of Congress, and which, if decided in their favor disposes of the whole case.

In the language of Waite C. J. "That question stood in the very front of the litigation, and if decided in favor of the Navigation Compony (plaintiffs in error) ends the whole matter. To give judgment the other way, without considering it, was simply to ignore one of the most important elements of the case as it stood in the record. There can be no escape from this conclusion." 123 U. S., 555.

It is not important at this time to consider whether the plaintiffs were right or not in this Federal question raised by them, and denied by the judgment of the State Court; that is a matter to be determined on the hearing on the merits—if raised and denied this Court has jurisdiction.

This question lies at the very threshold of any inquiry on the subject; the other non-Federal questions lay behind it, for had this been disposed of in our favor, there was nothing else left in the case.

The question whether the heirs were made parties by the recitals of the decree of May 4th, 1872, and its effect, could not be examined at all, without considering the void decree of sale May 4th, 1871, void by reason of rights claimed under the Act of Congress. For conceding that the heirs were parties by due process of law in May, 1872, the question raised is still there, could that decree, by confirming a sale made under a void decree, a decree which was nullity, make the void decree valid.

(b) The leading idea in the extracts made from the answers, raises distinctly a Federal question; to wit: that the lands of

Parker West descended to his heirs and were subject to the payment of his debts, "*just as if there had been no confiscation.*"

And it is the assumption of this proposition as true, that gives plausibility to the argument of the defendants in error, that the non-Federal questions dispose of the case, and it was unnecessary for the Court to pass on the Federal question.

It is true that if there had been *no confiscation;* in the consolidated suits, Parker West was the only party defendant essential to the enforcement of a judgment lien against his lands; then the *decree of sale May 4th*, 1871, would have been valid, and the only question which the heirs could have raised, would have been were they made parties in May 4th, 1872, to a decree confirming a *valid decree of sale*, valid as to their ancestor in whom was the fee to the land and valid as to them. If such had been the case, we may concede that there would be no Federal question in the case, which must of necessity be decided before the other questions could be reached.

But in order to treat this case, *as if there had been no confiscation*, it is requisite that the Court first construe the Act of Congress, July 17th, 1862, and determine who were essential parties to that suit, to determine that the heirs were not.

So in discussing the question of estoppel and laches, just as in the question of the validity of the decree of May 4th, 1872, making the heirs parties, it is assumed that all the proceedings in the consolidated causes prior to May 4th, 1872, were valid, a position which cannot be reached without construing the act of July 17th, 1862.

Not only is this true, but both in the brief and the opinion of the Court, on the question of estoppel and laches, it is assumed that the Court sold and the purchasers bought the fee in these lands, and the conduct of the plaintiffs in error was with knowledge of such claim. This assumption is in the

teeth of the record; the decree of sale directed a sale only of "all the interest of Parker West in that certain tract of land known as Newport News"; from the nature of the suits, to enforce judgment liens, only the interest of the judgment debtor could be sold; and the bill alleged that he had no interest whatever. Bill par. IV and V, p. 26 of record, assignment of errors, p. 11.)

The Court, then, must have decided that the fee was in Parker West at the time the decree of sale was made before they could consider the question of estoppel, for we are not to presume that the Court intended to declare that our knowledge of the fact that the purchasers had bought only the interest of Parker West (which was nothing) would affect us, in the same manner as our knowledge that they had bought and claimed the fee. In considering the question of estoppel and laches, if they claimed only the interest of Parker West, at the date of the decree of sale May 4th, 1871, and not the fee, there was no reason why the heirs should assert a claim against them.

(c) The denial of the motion to dismiss, in Shields vs. Schiff, 124 U. S., 531, and Avegno vs. Schmidt, 113 U. S., 293, would seem to be conclusive on the question in the case at bar.

There the sale was of land mortgaged prior to the confiscation of the property, the heirs of the offender were not parties to the proceedings of foreclosure, they claimed that they were necessary parties, and the foreclosure sale void for want of jurisdiction.

The only answer to their position was the nature of the mortgage, which contained the pact *de non alienando*, providing expressly that in the event of foreclosure, it should not be necessary to make the alienee of the mortgagor a party, but

that he might be proceeded against alone. So that conceding that the confiscation decree was equivalent to an alienation of the land to the Government or its purchasers, and the heirs, yet it was a part of the mortgage contract, they should *not* be made parties.

But notwithstanding, this Court agreed with the State Court upon this non-Federal question, a question of the local law of Louisiana, it took jurisdiction, because in determining this question it was necessary to do what the State Court (in that case in its opinion) did, consider and construe the Act of July 17th, 1862.

Here there is no pact *de non alienando*, the suits were to enforce judgment liens under a statute that requires the alienees to be made parties, and that the lands last aliened should be first taken to satisfy the judgment lien.

True, that in the case at bar, the opinion of the Court just as in the cases cited, proceeds upon the non-Federal question; of the effect of the recitals of the decree of May 4th, 1872, purchaser for value, &c.—but in each of them it is also true, that it is not possible to decide the non-Federal questions without considering and passing upon the rights claimed under the Act of Congress, July 17th, 1862.

There are many questions in the case, but they all centre upon the one prominent question in the case, the effect of the Confiscation Act upon the rights of the ancestor, the heirs and the creditors of the ancestor. Like the avenues in the city of Washington and the Capitol, they lead in many directions, but it is not possible to pass through the whole length of any one of them without coming to the Capitol. The Federal question in this case is the one question upon which all others hang, and it must first be termined before the others are considered.

(d) So far we have discussed the Federal question as to the proceedings in the consolidated causes prior to the decree of May 4th, 1872.

We now claim that if all the proceedings were valid up to that date, the Court has so construed the statute as to reviving a suit, upon the death of the defendant, against the succession to the title, as to deprive the heirs of their property without due process of law, contrary to the provisions of the 14th Amendment to the Constitution of the United States.

It is alleged in the bill that upon the death of Parker West there were but two modes in which the heirs as his successors could be brought before the Court; one was by an amended and supplemental bill, followed by process to answer; the other by *Scire Facias* under the statute to revive; that neither of these modes were pursued, and that the statute in reference to *Scire Facias* did not allow the successors to become parties by motion. (Par. 9, p. 29 of record—assignments of errors, p. 12 of record.)

Yet the Court has so construed this statute as to allow the heirs to be made parties by the recitals of a decree of which they had no knowledge, purporting to be made on their motion, thus depriving them of the notice of the revival of the suit provided for by the statute in reference to *Scire Facias*. Code 1873, ch. 169, sec. 4.

If, as the heirs claimed, they could only be made parties on the death of Parker West, by *Scire Facias*, then by this decision they are deprived of their property without due process of law—this is prohibited by the 14th Amendment. And although the question as to the violation of this amendment is made for the first time here it comes within the rule of the cases of Arrowshith vs. Harmoning, 118 U. S, 194, and Eureka Lake Co. vs. Yuba County, 116 U. S., 410 *supra*.

In the case last cited, the State Court had construed the statute of California to allow an order to show cause why the corporation should not be fined for a contempt, under the circumstances stated, to be served upon the attorneys of record of the corporation. And it was claimed that this construction of the statute was a violation of the 14th Amendment.

The burden of our complaint in this whole matter, from beginning to the end, is that we have had no day in Court, that the rights of property which we claim have been taken from us without due process of law and not according to the law of the land.

When the consolidated causes were commenced against Parker West alone as defendant, we, the heirs presumptive, had the right to be before the Court to protect our interests, basing our claim upon the decisions of this Court, Waite, C. J., in Pike vs. Wassel, 94 U. S., 711, saying: "If they (we) do not hold the fee, they are certainly the only persons now living who represent those for whom the joint resolution of Congress was passed. They at least appear to have the estate in expectancy. Under these circumstances, as there is no one else to look after the interests of the successor, we think they may properly be permitted to do whatever is necessary to protect it from forfeiture or incumbrance." p. 714-5.

It is alleged that prior to the death of Parker West, in December, 1871, no process of any kind was issued against the heirs in these suits to enforce the judgment liens; none was asked for in the bills; there were no allegations in the bills against the heirs; all these things are conceded to be true.

After this time there was no process of any kind issued against them, and especially the *Scire Facias* provided for such cases by Statute was not issued; this too is a concession.

What is the substitute for this due process of law, to which

the heirs were entitled, but confessedly have been deprived of?

It is the recital of a decree, May 4th, 1872, that contrary to the Statute in such cases made provided, the heirs appeared and on their own motion were made parties to these suits. And the evidence in the record shows that this decree was drawn by the counsel for the plaintiffs whose name is signed to one of the bills, and dictated by the counsel for the plaintiff whose name is signed to the other of the bills filed by the judgment debtors of Parker West. [Dep. of Geo. M. Peek, p. 202, questions 1 to 4, and bills, pp. 69 to 71.]

One of these counsel, C. K. Mallory, claiming also to represent the heirs, an authority distinctly denied in the bill and in the depositions. [p. 29, par. 8 of bill; Dep. Geo. B. West, pp. 165-167, questions 1 to 12; pp. 144-5, questions, 1 to 3.]

It is the recitals of such a decree, offered to the Court by the counsel of the judgment lienors, whose interests were antagonistic to the heirs, and who could not represent them, that is made a substitute for the due process of law.

(e) The refusal of the Court of appeals to amend their decree affirming the decision of the Circuit Court, "so as to be without prejudice to any suit at law now pending," raises distinctly a Federal question, and the decision was against the right claimed.

It was stated in the petition that an action of ejectment was pending for the lands in controversy, awaiting the decision of the case in equity which asked that the decrees of May 4th, 1871 and May 4th, 1872, and the deeds to the purchasers should be annulled; and it was prayed that the decree refusing relief on equitable grounds should not affect the suit at law. The prayer of the petition was refused. [pp. 218-219 of record.]

As stated in the petition, "were it a concession that the effect of the decrees of May 4th, 1871 and May 4th, 1872, in the consolidated causes and the deeds made to the purchasers, was to vest in them only such title as was vested in Parker West, the judgment debtor," the opinion might be strictly accurate.

This was one of the points which the Court asked to leave open in the suit at law, but the privilege was denied.

Whether a decree of sale in a suit alone against the offender, the owner of confiscated lands, which directs a sale "*of all the interest of the offender*," even if subsequently confirmed, can vest in the purchaser under that decree of sale, the fee to the land, depends upon the construction to be given to the act of July 17th, 1862.

This question was decided in rejecting the petition and refusing to amend, and decided against the right claimed.

We claim, then—

(1) That a Federal question was distinctly raised by the pleadings.

(2) That the Federal question was simply ignored by the State Court—but that the judgment given could not have been rendered without deciding the Federal question—as clearly appears from an analysis of the case.

That the non-Federal questions decided in the opinion lay behind the Federal questions, which were at the threshold of the case.

(3) That the decision or judgment was against the right claimed.

We have endeavored not to discuss the merits of the case,

but they are so inextricably entwined around the Federal question, that at times it has been difficult to prevent it, especially when replying to a brief which consists largely of extracts from the pleadings and the opinion bearing upon the merits, and not on the Federal question.

W. H. BURROUGHS & BRO.,

Counsel for Plaintiffs in Error.

December 27, 1888.

915a

2 Sheets, Sheet 2.

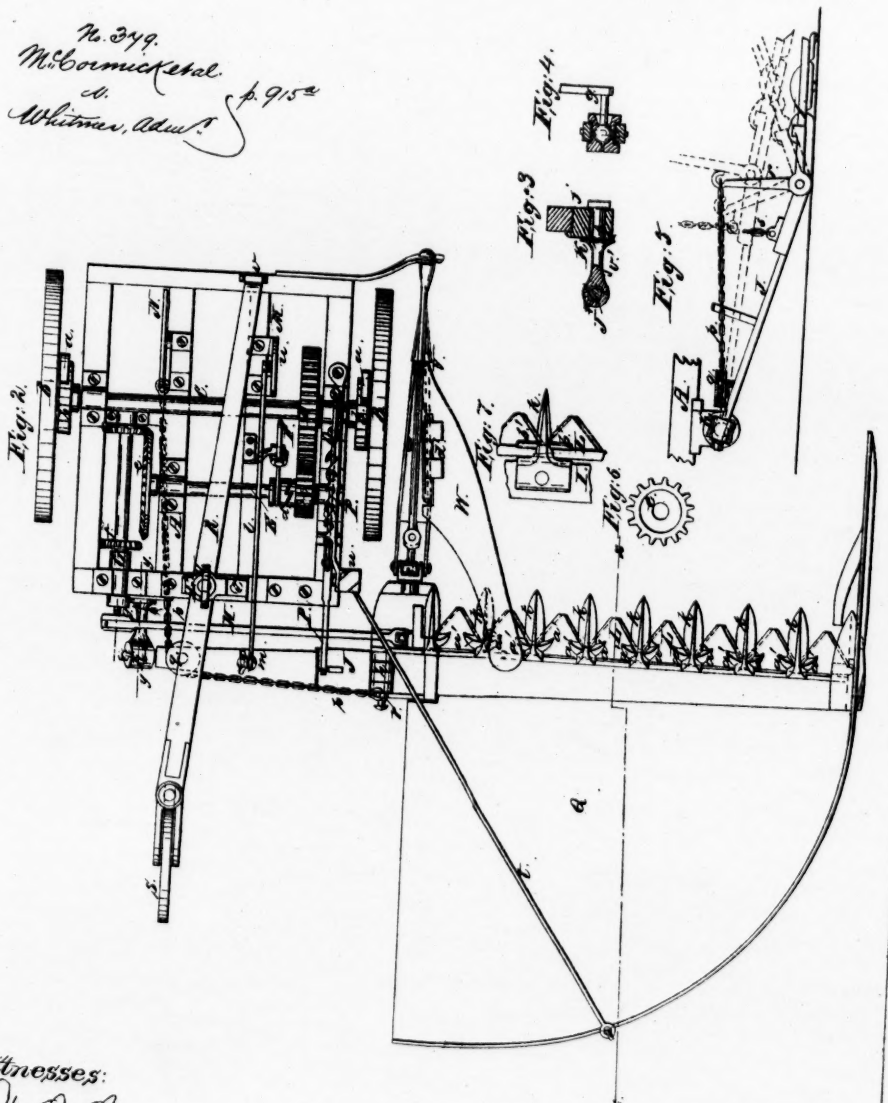
A. B. Graham,

Harvester.

No. 67,041.

Patented July 23, 1867.

No. 379.
McCormick et al.
vs.
Whitman, Adm'r
p. 915a



Witnesses:
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H. L. Pfeil

Inventor:
A. B. Graham
By Munn & Co
Attorneys

2 Sheets. Sheet 1.

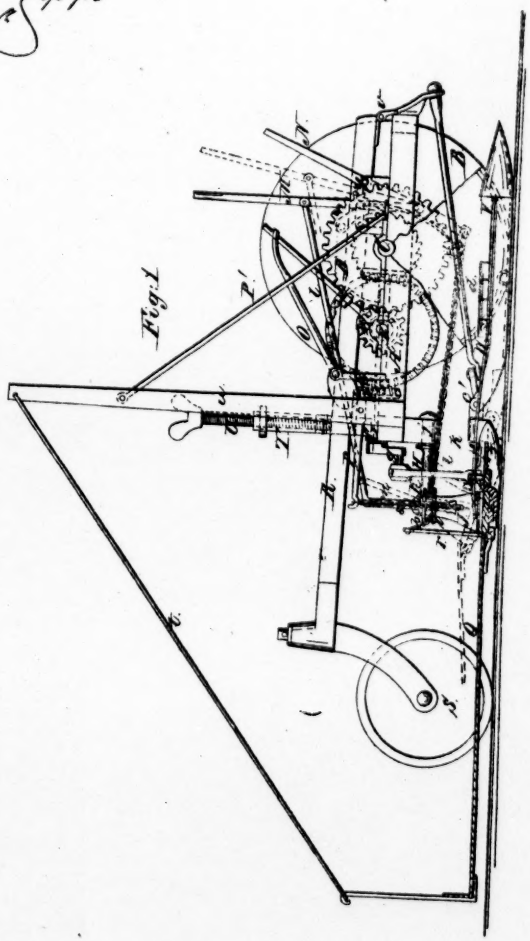
A. B. Graham,

Harvester.

No. 67,041. Patented July 23, 1867.

No. 379.
McCormick et al
v.
Whitmore, Adm'r
} p. 915

Fig. 1.



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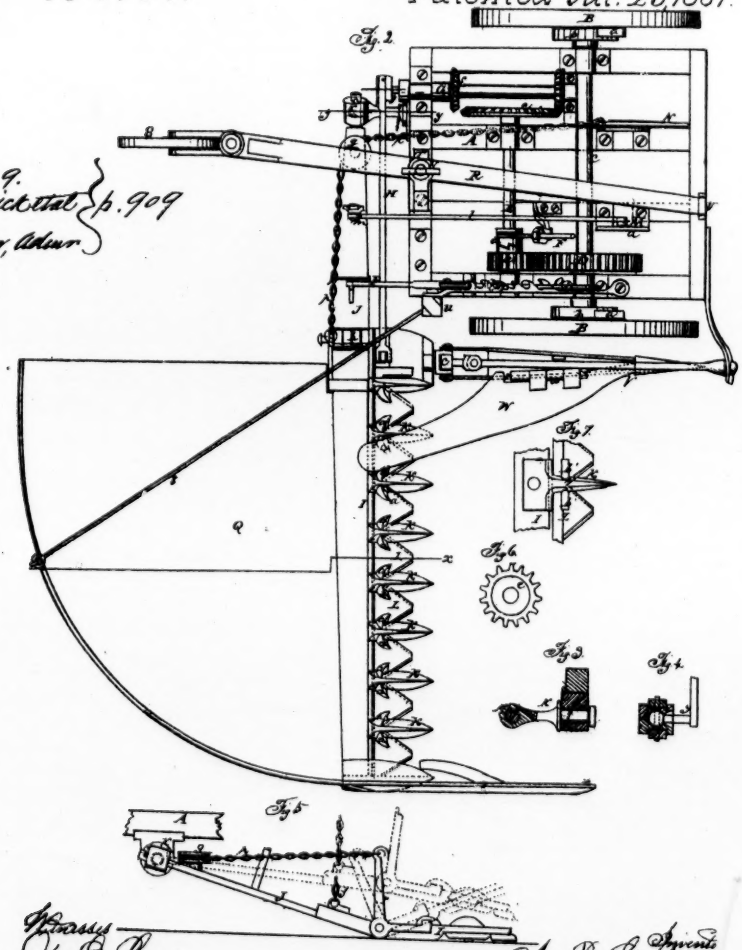
Sheet 2 - 2 Sheets.

A. B. Graham.

Mower.

No 67041 Patented Jul. 23 1867.

No 379. McCormick et al v. Whitmer, Admr } p. 909



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Sheet 1 - 2 Sheets.

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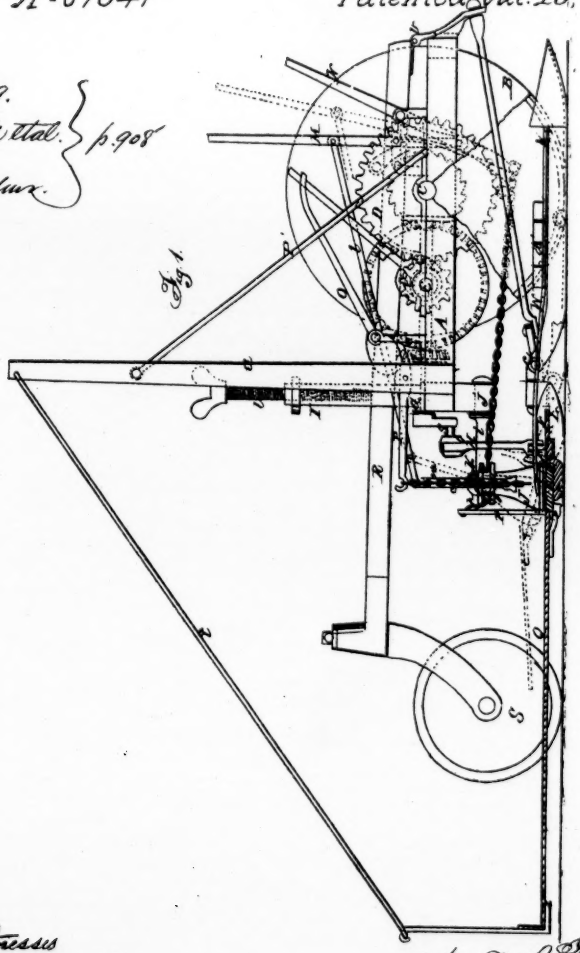
No 67041 Patented Jul. 23, 1867.

No. 379.
McCormick et al. } p. 908
v.
Whitman, Admx.



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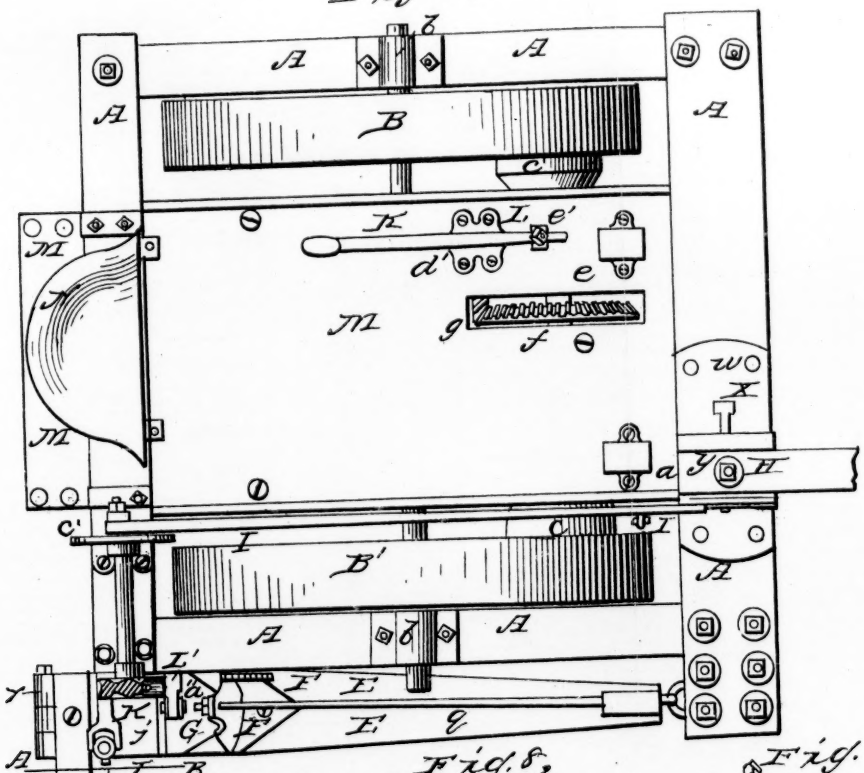
5 Sheets—Sheet 1.

E. BALL.

Combined Reaper and Mower.

No. 25,797. Patented Oct. 18, 1859.

Fig. 1,



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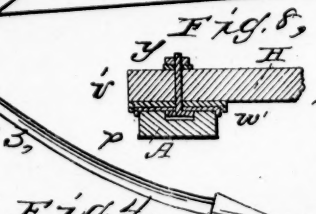

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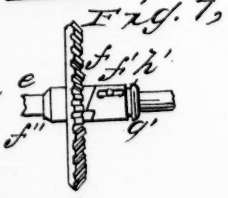
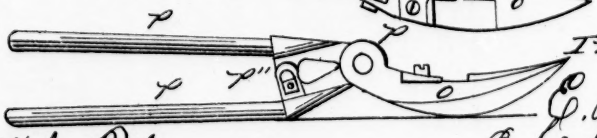


Fig. 3,

Fig. 4,



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N. PETERS. Photo-Lithographer. Washington, D. C.

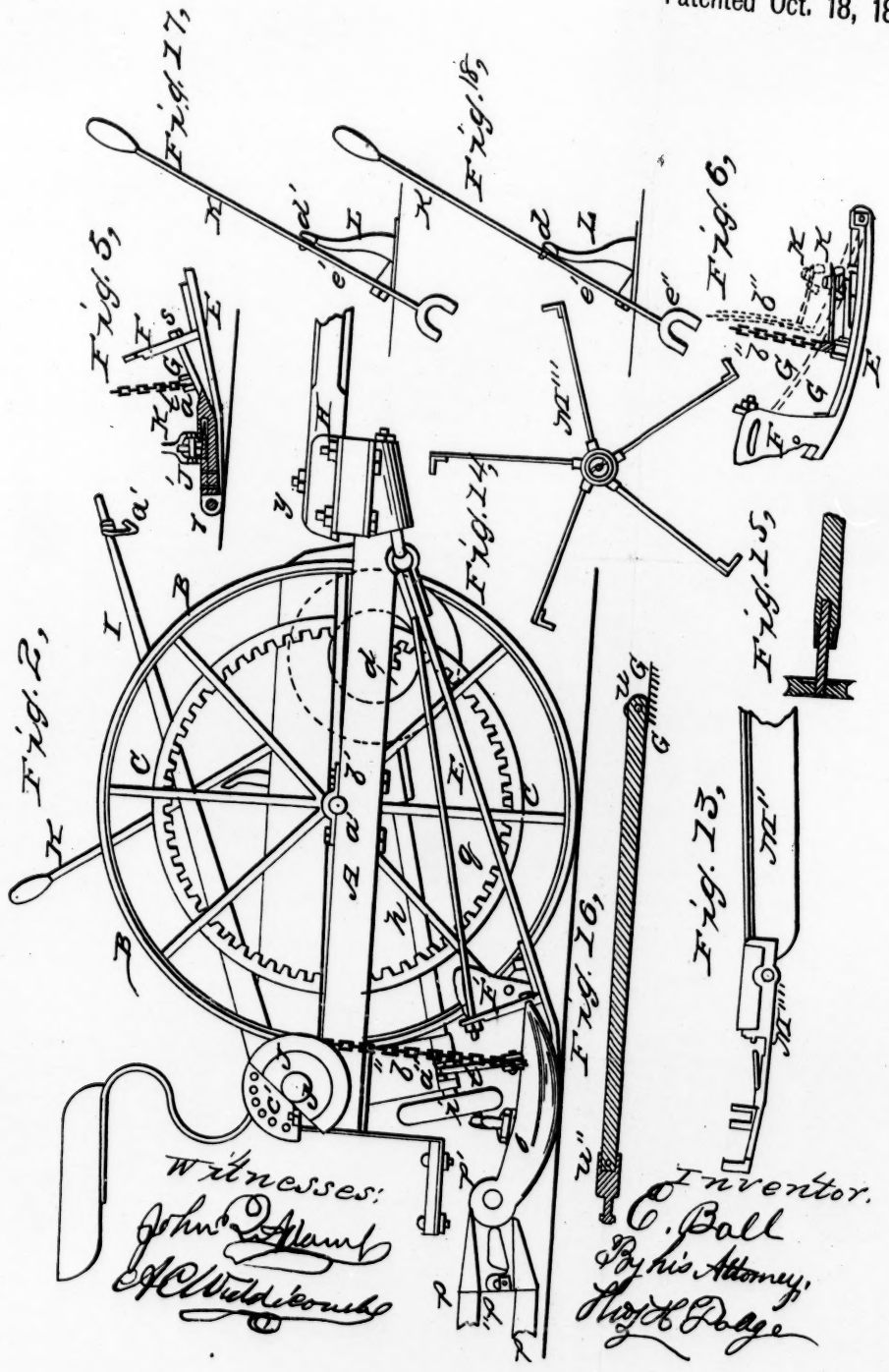
E. BALL.

5 Sheets—Sheet 2.

Combined Reaper and Mower.

No. 25,797.

Patented Oct. 18, 1859.



N. PETERS. Photo-Lithographer. Washington, D. C.

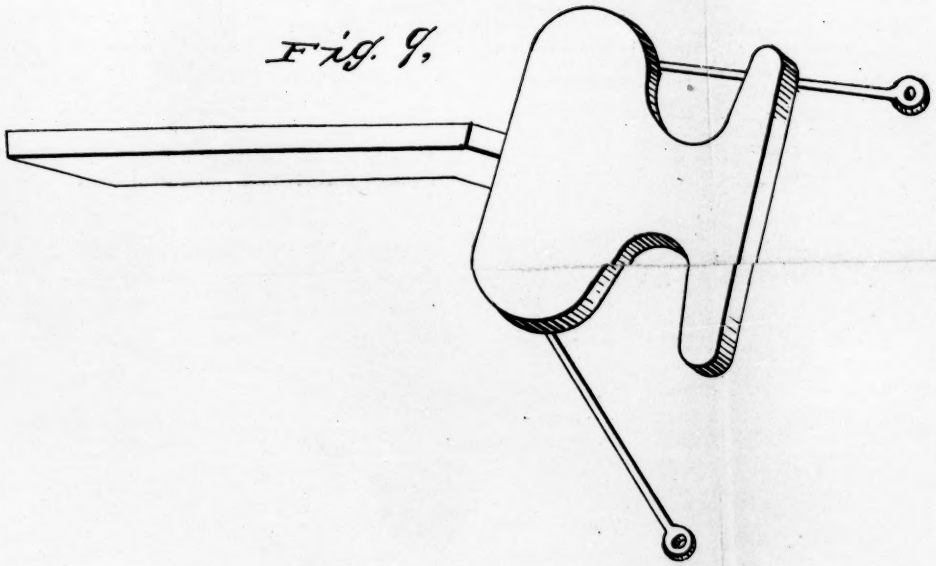
5 Sheets—Sheet 3.

E. BALL.

Combined Reaper and Mower.

No. 25,797. Patented Oct. 18,-1859.

Fig. 9.



Witnesses:

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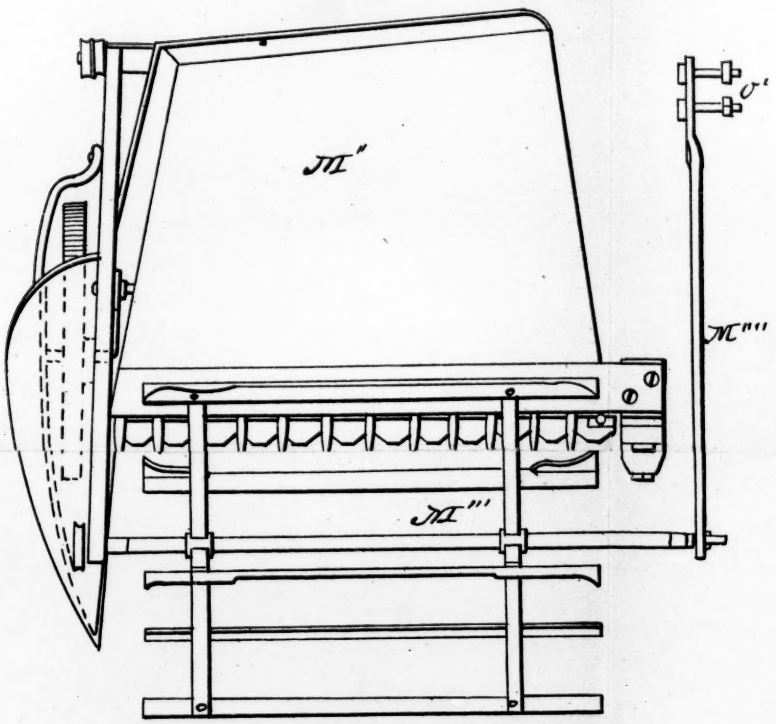
5 Sheets—Sheet 4.

E. BALL.

Combined Reaper and Mower.

No. 25,797. Patented Oct. 18, 1859.

Fig. 11,



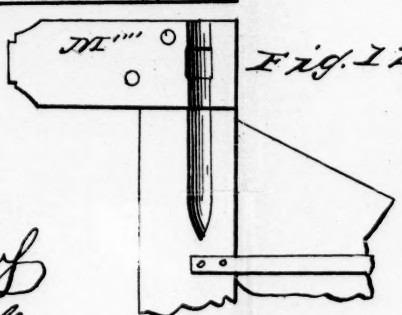


Fig. 12,

Witnesses:

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H C Middlecombe.

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By his Attorneys.

Thos H Dodge

N. PETERS. Photo-Lithographer. Washington. D. C.

5 Sheets—Sheet 5.

E. BALL.

Combined Reaper and Mower.

No. 25,797. Patented Oct. 18, 1859.

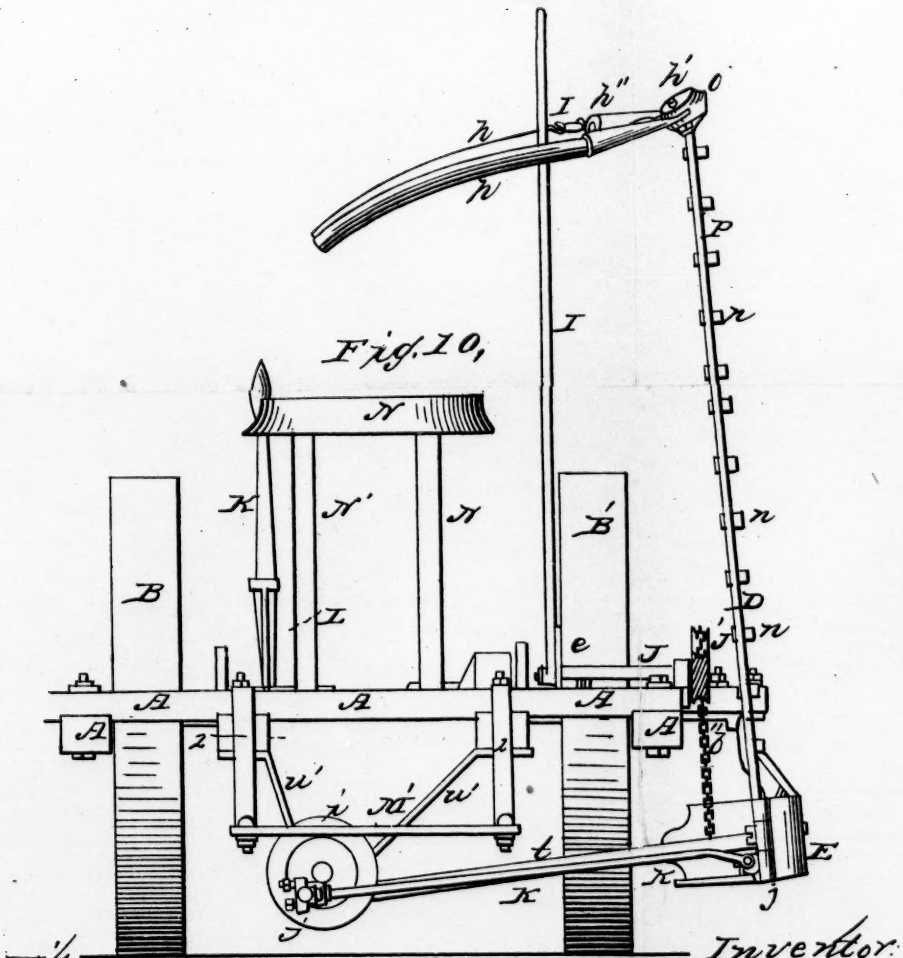

Fig. 10.

Witnesses:
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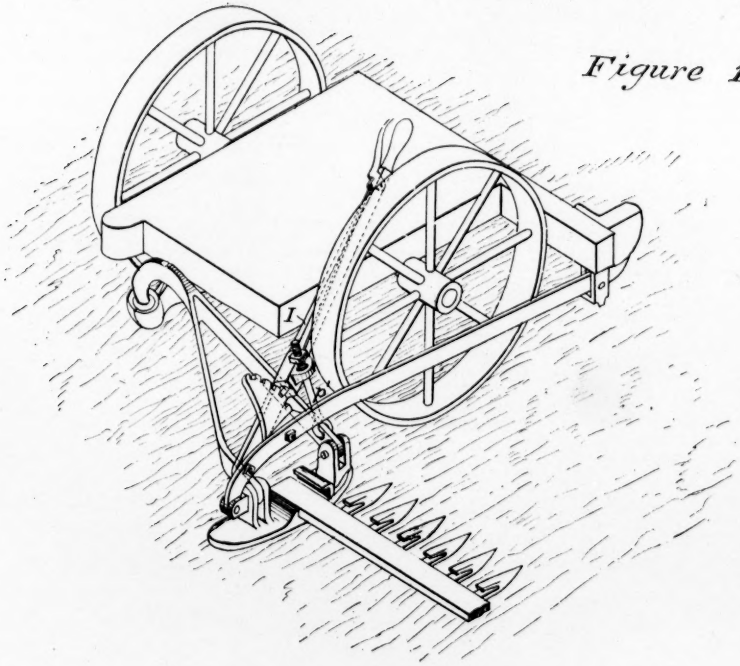
A. C. Wilkinson

Inventor:
E. Ball By his Attorney.
Thos. H. Dodge

N. PETERS. Photo-Lithographer. Washington, D. C.

Figure 11.



D. Zug.

Mower.

No 25697 Patented Oct. 4, 1859.

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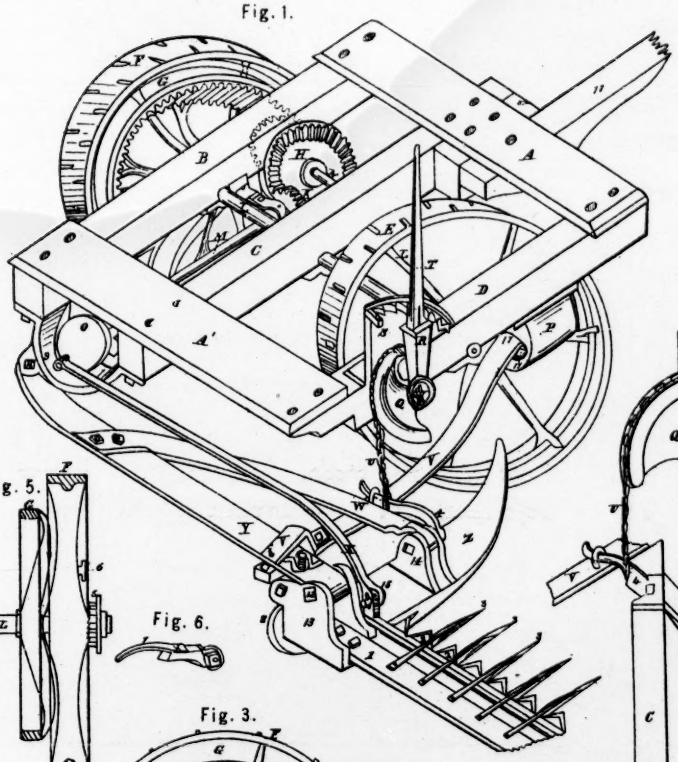

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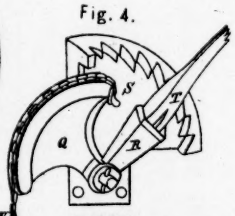

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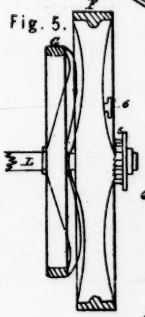


Fig. 6.

Fig. 2.

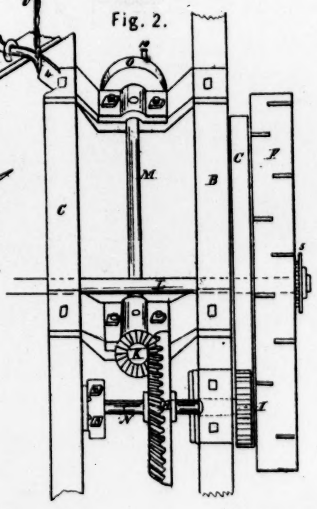
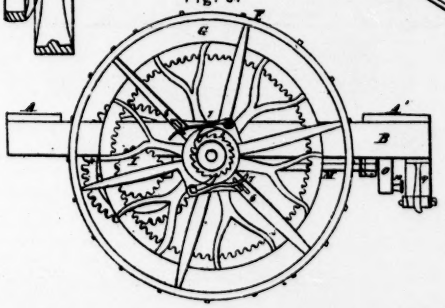


Fig. 3.



Witnesses.

S. G. Ulysses
J. Stauffer

Inventors.

David Zug

G. C. DOLPH.

Mower.

No. 18,141. Patented Sept. 8, 1857.

Fig. 3

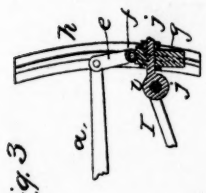


Fig. 2

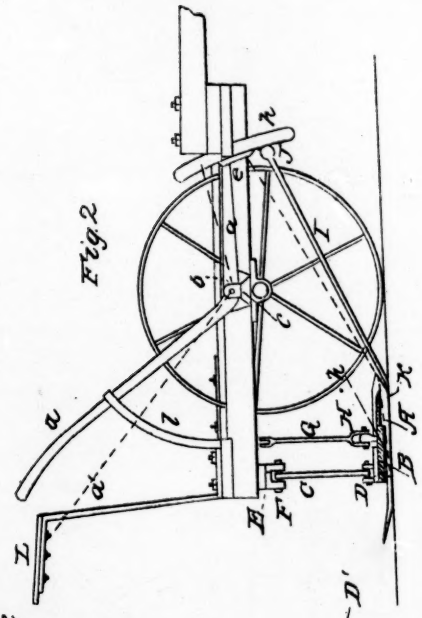
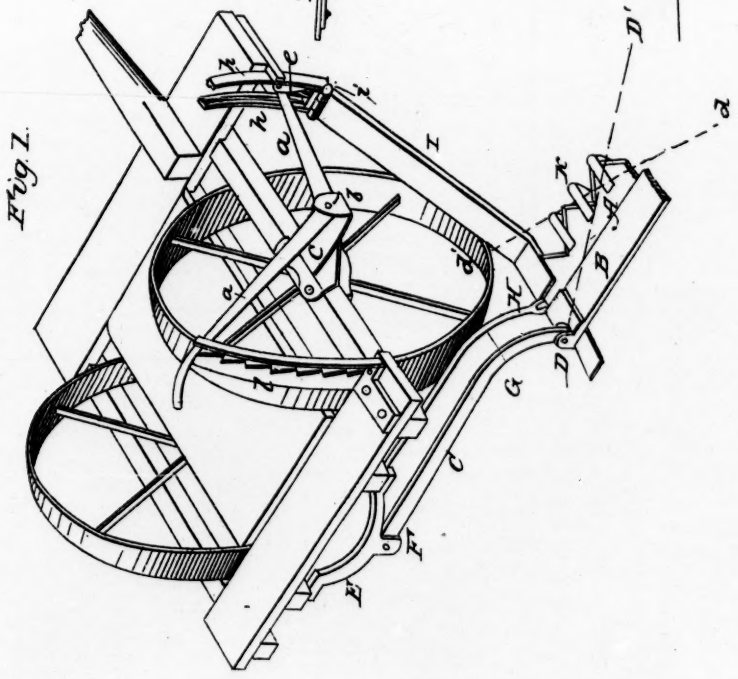


Fig. 1.



2 Sheets. Sheet 1.

S. S. Bartlett,

Harvester

No. 34,545. Patented Feb. 25, 1862

Fig. 3.

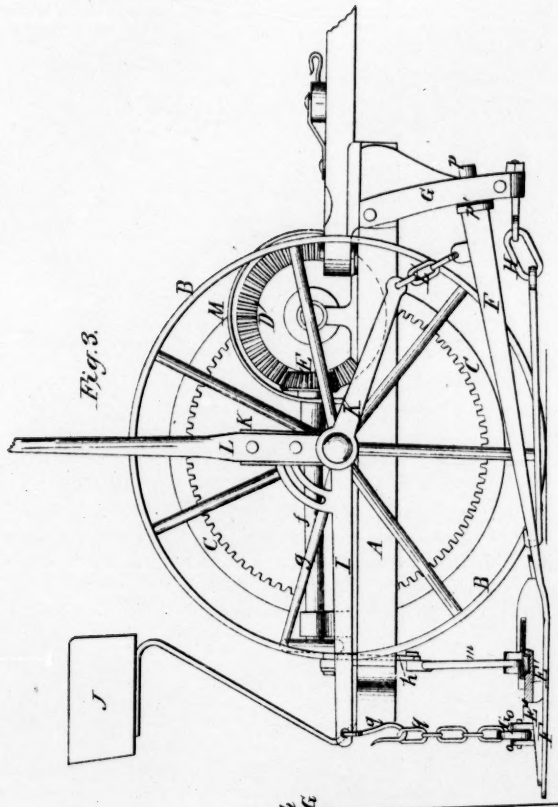
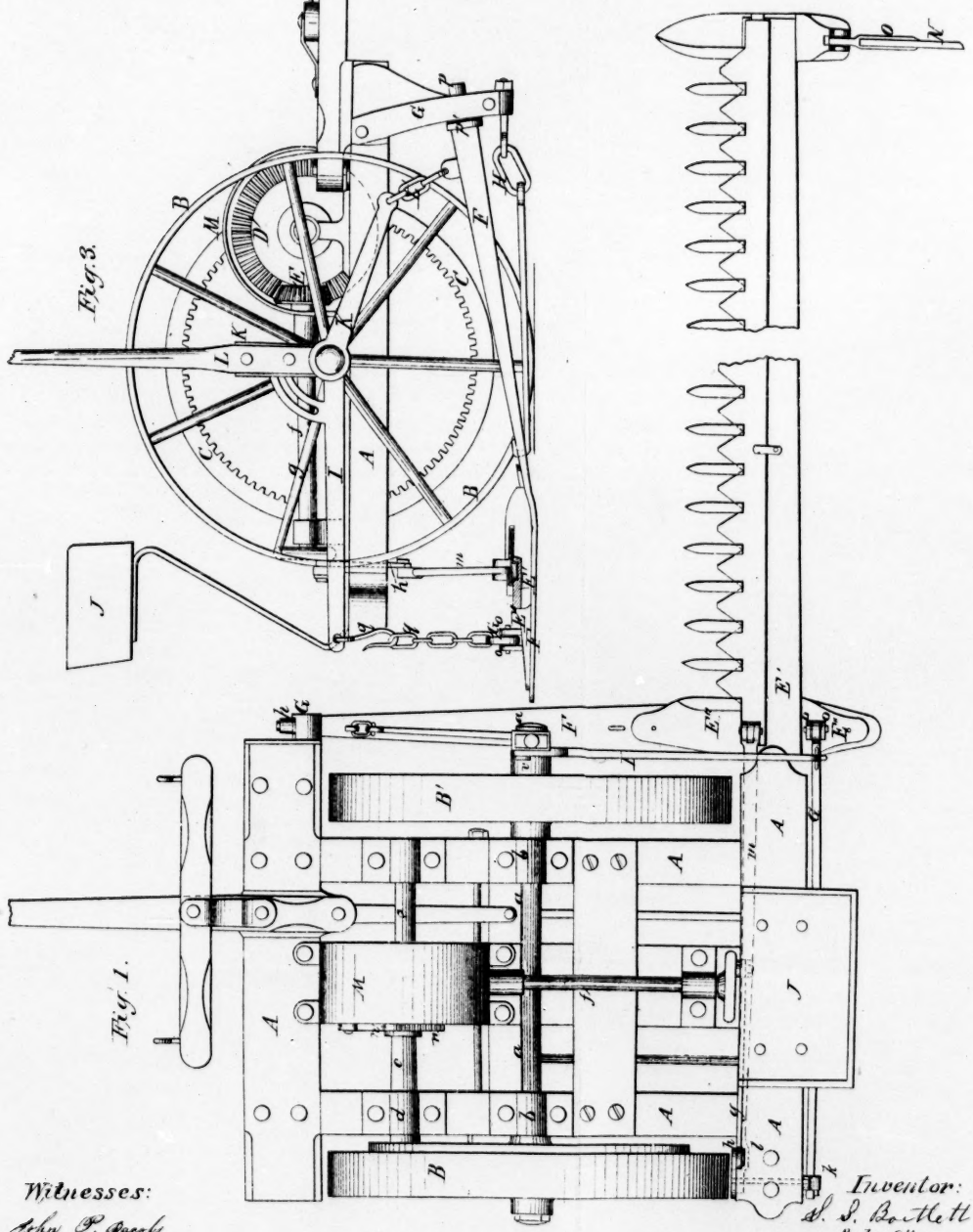


Fig. 1.



Witnesses:

John P. Jacob

D. Dana, Legt

Inventor:

S. S. Bartlett

By his Attorney

Thos. H. Dodge

N. PETERS, Photo-Lithographer, Washington, D. C.

2 Sheets-Sheet 2

S. S. Bartlett,

Harvester.

No. 34,545. Patented Feb. 25, 1862.

Fig. 5.

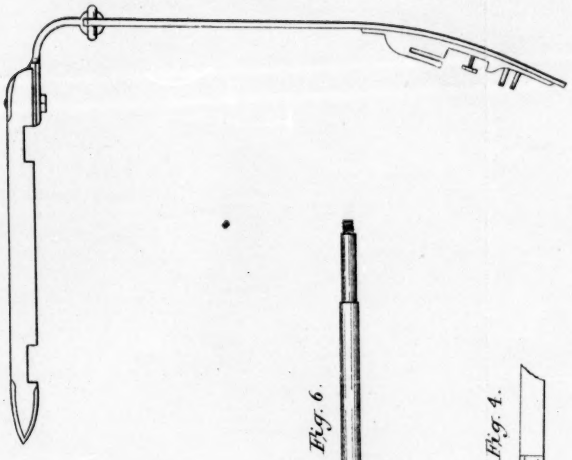


Fig. 6.

Fig. 4.

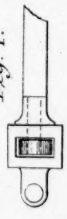
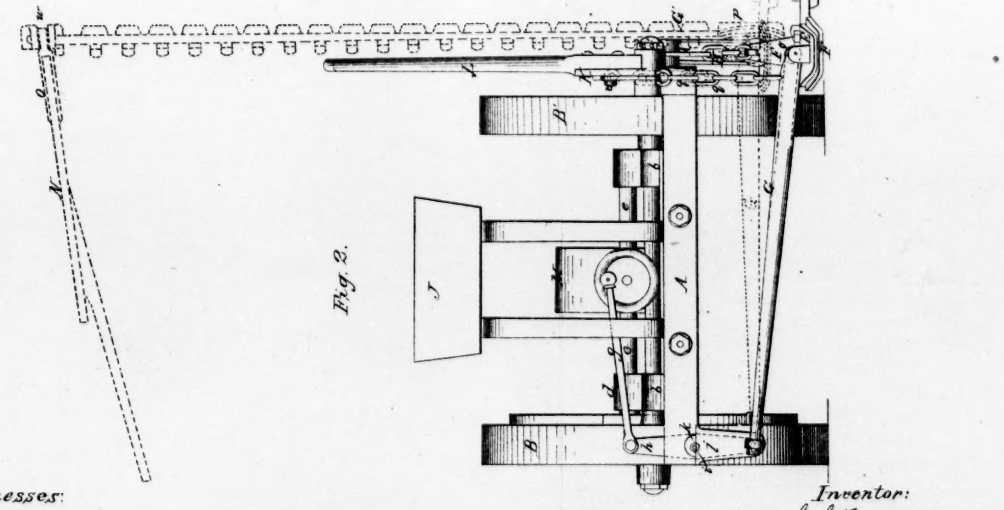


Fig. 2.



Witnesses:
John S. Jacobs
D. D. and Dodge

Inventor:
S. S. Bartlett
By his Attorney
Thos. H. Dodge
Washington D.C.

N. PETERS. Photo-Lithographer. Washington, D. C.

UNITED STATES PATENT OFFICE.

JOHN M. GORHAM, OF CLEVELAND, OHIO.

WASH-BOARD

SPECIFICATION forming part of Letters Patent No. 223,338, dated January 6, 1880

Application filed November 27, 1878.

To all whom it may concern:

Be it known that I, JOHN M. GORHAM, of Cleveland, in the county of Cuyahoga and State of Ohio, have invented certain new and useful Improvements in Wash-Board Frames; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it pertains to make and use it, reference being had to the accompanying drawings which form part of this specification.

My invention relates to wash-boards, particularly to the combination, with a wash-board of a protector constructed to bend or yield to pressure and to return to position when said pressure is removed. This protector is to shield the person of the washer from splashing water or suds.

Protectors have been heretofore employed in connection with wash-boards, and they have been of but two general types—one wherein the protector is rigid and rigidly attached to the wash-board frame. A protector thus constructed and attached is not capable of yielding or moving from its position when the body of the operator presses against it; and it is on this account frequently objected to. The second type is when the protector is attached to the wash-board frame by a joint or pivot, and is allowed a swinging movement; but it possesses no elastic or resilient quality or function, and, when moved by pressure, has no power to return again to normal position when said pressure is removed. My invention is designed to overcome the objections and defects presented in these two old types of protectors; and as said invention broadly comprehends any wash-board protector constructed to bend or yield to pressure and to return to position when said pressure is removed, it is apparent that I am not to be confined to any specific form or mere construction of device, inasmuch as a variety of modified mechanical structures may be adopted in embodying my said invention. I will, however, illustrate and describe one or two effective forms of device according to this invention.

In the drawings, Figure 1 illustrates a wash-board and its protector made according to my invention. This figure is in longitudinal vertical section, and it represents the protector as laid down upon the face of the board as packed for shipment. Fig. 2 is a similar view of the same device, only the protector is shown as freed and sprung out into operative position. Fig. 3 is a front view of the device as shown in Fig. 2. Fig. 4 represents a modified form of my device, wherein the protector, instead of being formed from a rigid piece and elastically pivoted to the frame, as shown in Figs. 1, 2, and 3, is made from a piece of rubber, spring metal, or equivalent material susceptible of itself yielding and returning to position, and this is rigidly fixed to the wash-board frame, as shown. Fig. 5 shows another modified embodiment of my invention, merely illustrating a different spring-coupler, C′, from that shown in Figs. 1, 2, and 3.

A is the wash-board frame, which may be of any size, description, or material. B is the rubbing-surface, which may also be of any character.

C is the protector, and C′ a spring, which may be either a coupler between the protector and wash-board frame, as shown in Fig. 5 of the drawings, or the protector may be pivoted to the frame and the spring C′ act to push or pull the protector into the position illustrated in Figs. 2 and 3.

The construction of the device shown in Fig. 4 I have already sufficiently specified in the preceding explanation of the drawings.

The operation of my device is readily understood. The spring C′, or the elastic character of the thing itself, as shown in Fig. 4, serves always to keep the protector in operative position. (See Figs. 2 and 3.) When the body of the operator presses against it, it yields in such a way as at the same time to press snugly against her person, and also to return at all times to position when said pressure is removed. It thus becomes very effective as a protector, while at the same time it is not wearing to the person or clothes of the operator.

Another peculiar feature of my wash-board is the flat manner in which it can be packed, as shown in Fig. 1 of the drawings. This is a great convenience and advantage in packing for shipment; and moreover, when thus packed, the protector is itself protected from injury to which it would otherwise be exposed. This is accomplished by locating the protector, as

shown in Figs. 1, 2, and 3 of the drawings, below the crown-piece and between the side pieces of the frame.

What I claim is—

1. In combination with a wash-board, a protector constructed substantially as described, so as to yield to pressure and to return to position when said pressure is relieved, substantially as and for the purpose shown.

2. The combination, with a wash-board, of a protector and a spring, said spring interposed between the wash-board and protector, and constructed to operate in retaining said protector in its open position and to return it to that position when moved therefrom.

3. In combination with a wash-board, a protector located below the crown-piece and between the side pieces of the wash-board frame, and constructed to fold down into or upon said wash-board even with or below the general plane of said wash-board frame substantially as and for the purpose shown.

In testimony whereof I have signed my name to this specification in the presence of two subscribing witnesses.

JOHN M. GORHAM.

Witnesses:
JNO. CROWELL, JR.,
W. E. DONNELLY.

16

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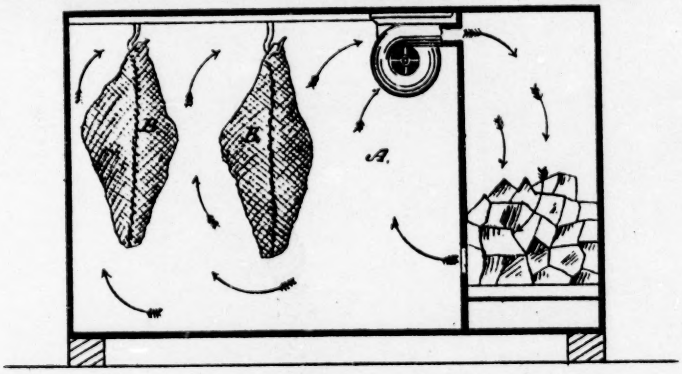
Drawings, - Bate American Patent.

J. J. BATE.

Process for Preserving Meats during Transportation and Storage.

No. 197,314. Patented Nov. 20, 1877.

Fig. 1.



No 862.
Bate Refrigerating Co. } p. 37.
v.
Hammond & Co

Fig. 2.

Wilnesses:
Henry Eichlay
H. Wells Jr

Inventor:
John J. Bate.
per James A Whitney
Atty.

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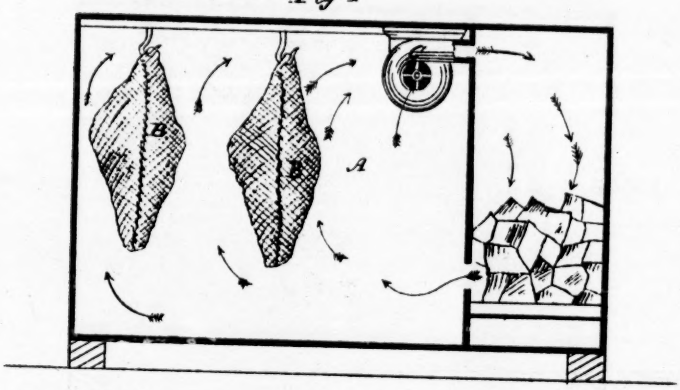
3 Sheets. Sheet 1

Impts. on Apparatus and Processes for Ventilation Refrigeration &c.

Fig 1



No 862.
Bate Refrigerating Co.
v.
Hammond & Co
} fr. 62

Fig. 2.

References:
A drill room
B enveloped quarters of beef
C fan blower.

New York 9th day of December A.D. 1870

Witnesses:
Henry Eichling
Edward Welpin

Certified to be the drawing referred to in the specification hereunto annexed

Inventor:
John Jones Bate

18

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Impls. on Apparatus and Processes for Ventilation, Refrigeration &c. 3 Sheets. Sheet N° 2

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Fig. 3.

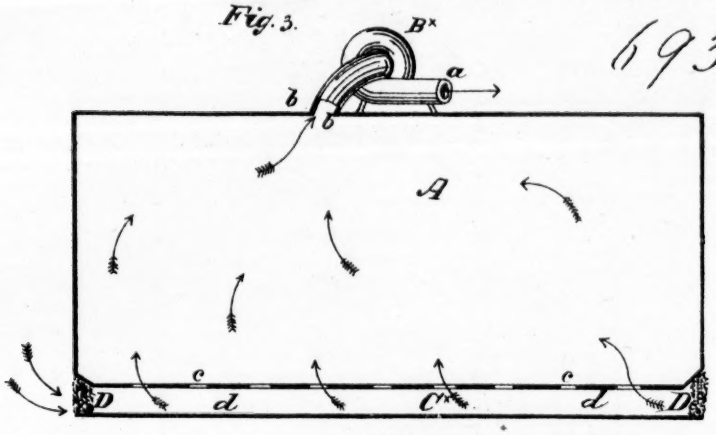

Fig. 4

No. 862.
Date Refrigerating &c. } 1863.
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Hammond & Lea

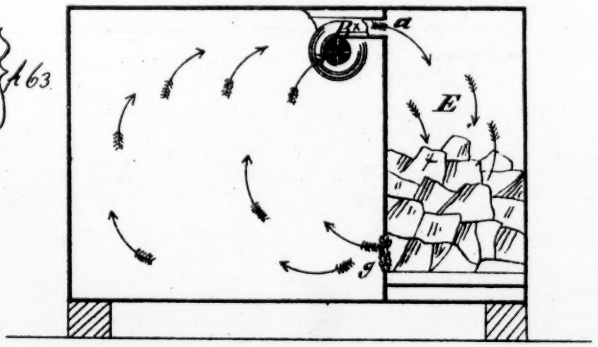
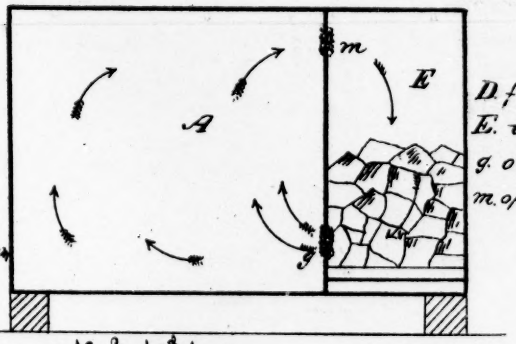


Fig. 5



References:
A. chill room
B× fan blower
C× sub floor
a. opening of fan
b. connection of fan × chill room
c. holes in floor × "
d. chamber.
D fibrous material
E. ice box
g. outlet in ice box
m. opening at top of ice box

New York 9th day of December A.D. 1863

Certified to be the drawing referred to in the specification hereunto annexed

Witnesses:
Henry Eichling
Edward Lovely

Inventor:
John Jones Bate

19

64

3 Sheets, Sheet 3.

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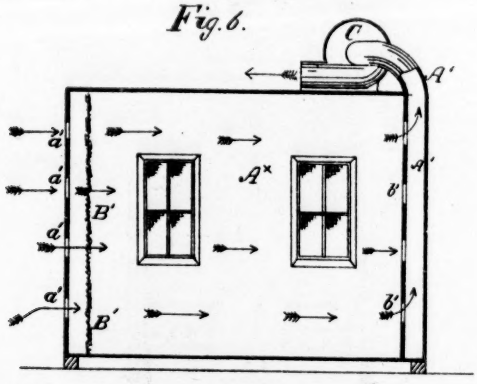
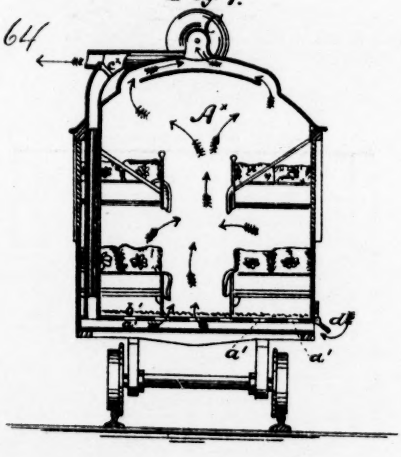
Duffels on Apparatus and Processes for Ventilation, Refrigeration &c.

Fig. 6.



No 862.
Bate Refrigerating Co.
v.
Hammond & Co.
} p 64

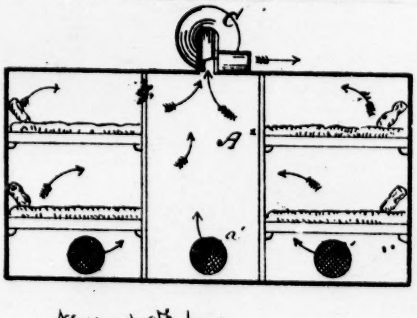
Fig. 7.



References:

A^x room, or building
B' fibrous material
a' inlets of air
A' outlet pipe
b' holes in outlet pipe
c' valve
d' valve
C. fan blower
f. pipe

Fig 3.



Witnesses:
Henry Eichling
Edward Wolly

New York 9th day of December A.D. 1876

Inventor:
John Gone Bate